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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 374

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK, PETITIONER,

vs.

MAMPRIL SEQUEIRA PEDREIRO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FILED SEPTEMBER 28, 1954

CERTIORARI GRANTED NOVEMBER 15, 1954

SUPREME COURT OF THE UNITED STATES

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1-2 In United States District Court, Southern District of New York

In the Matter of the Petition for Review of
MAMPRIL SEQUEIRA PEDREIRO, Petitioner

vs.

EDWARD J. SHAUGHNESSY, as District Director of Immigration and Naturalization for the District of New York, Respondent

To the District Court of the United States for the Southern District of New York:

PETITION—Filed March 15, 1954

The petitioner, MAMPRIL SEQUEIRA PEDREIRO, petitioning by his attorneys,, NEMEROFF, JELLINE, DANZIG & PALEY, respectfully alleges and shows to this Court as follows:

1. This action arises under the Immigration Laws of the United States. Jurisdiction is vested in this Court by the Act of June 27, 1952, 66 Stat. 230, 8 U.S. Code Sec. 1329, by the Act of June 27, 1952, 66 Stat. 208, 8 U.S. Code Sec. 1252, and alos by 60 Stat. 243, Act of June 11, 1946, 5 U.S. Code Section 1009.

2. The respondent is a duly appointed and acting District Director of Immigration for the District of New York, which is within the district of this court.

3. On December 4, 1951, a hearing was conducted at the office of the Immigration and Naturalization Service at New York City, New York, before a Hearing Officer of the Immigration and Naturalization Service to show cause why your petitioner should not be deported.

3 4. The evidence adduced at said hearing was in contravention of the Constitution of the United States and the Fifth Amendment in that your petitioner was deprived of due process of law and in that your petitioner was compelled to testify on matters which might tend to incriminate him such as his entry into the United States and his purposes in coming to the United States.

5. On or about December 4, 1951, the Hearing Officer rendered his decision and order in the matter. The order provided that petitioner be deported from the United States on the charges stated in the warrant of arrest.

6. That other than the evidence referred to in paragraph "4" hereof, no legal evidence of any nature which could form the basis of such a finding as stated in paragraph "5" hereof was adduced at said hearing.

7. That exceptions to the Hearing Officer's decision and order were duly filed with the District Director and on or about May 5, 1952, the Assistant Commissioner, Adjudication Division, adopted the order of the Hearing Officer that petitioner be deported from the United States on the charges stated in the warrant of arrest.

8. That the decision and order of the Hearing Officer, as adopted by the Assistant Commissioner, Adjudication Division, was illegal and erroneous in that there was no legal substantial evidence on the record as a whole, in that your petitioner was deprived of due process of law, and that your petitioner is in imminent danger of being deprived of liberty without due process of law.

9. That your petitioner duly filed notice of appeal to the Board of Immigration Appeals from the order and decision of the Hearing Officer adopted by the Assistant Commissioner, Adjudication Division and duly prosecuted his appeal.

4 10. That on or about June 24, 1953, the Board of Immigration Appeals ordered the appeal from the decision and order of the Hearing Officer, as adopted by Assistant Commissioner, Adjudications Division, be dismissed.

11. That on or about July 13, 1953, and February 4 1954, your petitioner made a motion to the Board of Immigration Appeals to re-open said hearings, which said motions were denied by the Board of Immigration Appeals on January 27th and February 4th, 1954, respectively.

12. That by virtue of said orders and decision of the Board of Immigration Appeals, the decision and order of the Hearing Officer, and adopted by the Assistant Commissioner, Adjudication Division, that petitioner be deported from the United States, pursuant to law on the charges stated in the warrant of arrest, became final.

13. The decision and order of the Board of Immigration Appeals was illegal and erroneous in that there was no legal substantial evidence on the record as a whole to support said decision and order, and your petitioner is in imminent danger of being deprived of liberty without due process of law.

14. That said order and decision of the Board of Immigration Appeals is a final determination that petitioner be deported, and petitioner has exhausted his administrative remedies.

Wherefore, petitioner prays that this Court

1. Review the order of the Board of Immigration Appeals.

2. Declare the order of the Hearing Officer, as adopted by the Assistant Commissioner, to be null and void.

3. Issue a temporary injunction staying execution of the aforesaid order of deportation pending final determination of the issues of this action by this court.

5-6 4. For such other and further relief as may be just and proper.

MAMPRIL SEQUEIRA PEDREIRO,
Petitioner.

Dated, New York, March 10, 1954.

MEMEROFF, JELLINE, DANZIG & PALEY,
By BERNARD KAUFMAN.

Duly sworn to by Mampril Sequeira Pedreiro, jurat, omitted in printing.

7-12 In United States District Court Southern District of New York

[Title omitted]

RESPONDENT'S NOTICE OF MOTION—Filed March 25, 1954

Sirs:

Please take notice that the undersigned will move this Court at a term for motions thereof, on the 30th day of March, 1954, in Room 506 of the United States Court House, Foley Square, Borough of Manhattan, City, State and Southern District of New York, at 10 A.M., or as soon thereafter as counsel can be heard, for an order dismissing the above entitled proceedings, pursuant to the provisions of Rule 12(b) of the Federal Rules of Civil Procedure, on the ground of lack of jurisdiction over the subject matter, on the further ground that there is a lack of an indispensable party in this proceeding, namely, the Commissioner of Immigration and Naturalization, and on the further ground that the petition fails to state a claim upon which relief can be granted.

Dated: March , 1954.

Yours, etc.

J. EDWARD LUMBARD,
United States Attorney for the Southern District of New York
Attorney for Respondent
Office & P. O. Address
United States Court House
Foley Square
Borough of Manhattan
City of New York.

To: NEMEROFF, JELLINE, DANZIG & PALEY, Esqs.
Attorneys for Petitioner,
350 Fifth Ave., New York, N.Y.

13 In United States District Court Southern District of New York

In the Matter of the Petition for Review of
MAMPRIL SEQUEIRA PEDREIRO, Petitioner

against

EDWARD J. SHAUGHNESSY, as District Director of Immigration and Naturalization for the District of New York, Respondent.

Appearances:

Nemeroff, Jelline, Danzig & Paley, Esqs.,
Attorneys for Petitioner
350 Fifth Avenue
New York 1, N. Y.
Honorable J. Edward Lumbard
United States Attorney for the
Southern District of New York
Attorney for Respondent
Philip M. Drake, Esq.
Assistant United States Attorney
Of Counsel

OPINION—April 9, 1954

DIMOCK, D. J.

Pedreiro brings this action to review an order of the Board of Immigration Appeals, to declare null and void an order of a hearing officer adopted by the Assistant Commissioner, and to obtain a temporary injunction staying execution of an order of deportation pending final determination of the issues herein. He adds the usual prayer for other and further relief. He cites as authority for his procedure section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U.S.C. Sec. 1009.

The District Director of Immigration and Naturalization for this District of New York who is the only adverse party named by Pedreiro makes this motion to dismiss on the ground that there is a lack of an indispensable party, namely, the Commissioner
14 of Immigration and Naturalization, and upon the further ground that habeas corpus is the exclusive means for reviewing deportation orders.

Taking up the question of non-joinder of parties let us see just what Pedreiro's situation is. He alleges that, after the issuance of a warrant of arrest, a deportation hearing was conducted on December 4, 1951, before a hearing officer of the Immigration and Naturalization Service at New York City; that the Hearing Officer, on December 4, 1951, rendered a decision and made an order directing that he be deported on the charges stated in the warrant

of arrest; that exceptions to the Hearing Officer's decision and order were duly filed, and on or about May 5, 1952, the Assistant Commissioner, Adjudication Division, adopted the order; that he appealed to the Board of Immigration Appeals but the Board, on or about June 24, 1953, ordered the appeal dismissed and that two subsequent motions to the Board to reopen the hearings were made and denied.

The charges in the warrant of arrest are not stated.

Without further specification, the order of deportation is attacked on the ground that the "evidence adduced at said hearing was in contravention of the Constitution of the United States and the Fifth Amendment in that" he "was deprived of due process of law and in that" he "was compelled to testify on matters which might tend to incriminate him such as his entry into the United States and his purposes in coming to the United States".

It was held in Vaz v. Shaughnessy, D.C.S.D.N.Y., 117 F. Supp. 778, aff'd., 2 Cir. 208 F 2d 70, that the Commissioner of Immigration and Naturalization and/or the Attorney General were indispensable parties to a proceeding brought under section 10 of the Administrative Procedure Act for (1) a declaratory judgment that the applicant was eligible for suspension of deportation, (2) an injunction against the District Director of Immigration and Naturalization and (3) a direction that the District Director reopen the deportation hearing for the purpose of permitting an application for suspension of deportation. In that case the alien's application had been considered and denied by a hearing officer, the Assistant Commissioner of Immigration and Naturalization and the Board of Immigration Appeals. It was there held that, to grant the relief sought and to effectively dispose of the controversy, the court would have to have jurisdiction over the superior officer. It was said that the court there could not, without the presence of the superior officer, grant all the relief that the plaintiff sought. Indeed no effective relief could have been given. The only effective relief would be that which would protect the alien in other Districts and that could not be obtained without getting jurisdiction over the superior officer.

In a proceeding to review a deportation order like the one at bar it is still clearer that the superior officer is a necessary party. Indeed before the Vaz case there were many which held that the Commissioner of Immigration and Naturalization was an indispensable party in actions to review orders of deportation. Paolo v. Garfinkel, . Cir., 200 F 2d 280. Slavik v. Miller, 3 Cir., 184 F. 2d 575, cert. denied 340 U.S. 955. Pokovinnikoff v. Miller, 3 Cir., 179 F. 2d 937. Medalina v. Shaughnessy, D.C.S.D.N.Y., 102 F. Supp. 950. Birns v. Commissioner of Immigration and Naturalization, D.C.N.D. Ohio, 103 F Supp 180. See Connor v. Miller, 2 Cir., 178 F 2d 755.

Here, however, Pedreiro says that his case is different; that he proceeds on constitutional ground and that the District Director proposes to deport him without warrant in law. Under those circumstances, he says, he need not join any one else in his suit to prevent that deportation. It may be true that Pedreiro has
16 a remedy against the District Director all alone but if so that remedy is habeas corpus. If he persists in proceeding under the Administrative Procedure Act he presents a case no more favorable for elimination of superior officers than the Vaz case. The relief he seeks includes a review of the action of the Board of Immigration Appeals. A direct review of that action is impossible without the presence of the Attorney General or the Commissioner of Immigration and Naturalization. Even if Pedreiro would be satisfied to let the order of the Board stand and rely on a declaration that it was invalid as between him and the District Director, that declaration would be ineffective against the superior officers. Marshall v. Crotty, 1 Cir., 185 F 2d 622, 627-628. The only effective relief would be that which would protect him in other Districts and that could not be obtained without getting jurisdiction over the superior officers. Even if the determination were that the order was not merely improper but indeed unconstitutional and utterly void, that determination would impart to the order no magic through which its sentence could reach out and bind persons who were not before the court.

All of the foregoing discussion has proceeded upon the assumption that the remedy chosen by Pedreiro is available for review of deportation orders. Since I conclude that, even if it is available for that purpose, it must be denied for lack of a necessary party, I can, as did the Court of Appeals in the Vaz case, dispose of the matter without passing on the question whether the remedy is available. It is noteworthy, however, that since the Court of Appeals decision in the Vaz case, the United States Supreme Court has, by an evenly divided court, affirmed a decision of the District of Columbia Court of Appeals holding that the Nationality Act of 1952 makes the remedy under the Administrative Procedure Act available in deportation order cases. Rubinstein v. Brownell, 206 F. 2d 449, aff'd sub nom. Brownell v. Rubinstein, 346 U.S. 929.

17-18 Since the instant case must be dismissed, Pedreiro's motions for a stay and for enlargement on bond fall with the dismissal and are denied without further consideration.

Dated: April 8, 1954.

E. J. DIMOCK,
United States District Court.

19-20 In United States District Court, Southern District of New York

In the Matter of the Petition for Review of
MAMPRIL SEQUEIRA PEDREIRO Petitioner

against

EDWARD J. SHAUGHNESSY, as District Director of Immigration and Naturalization for the District of New York, Respondent

JUDGMENT—April 23, 1954

The respondent's motion for an order dismissing the above entitled action on the ground that there is a lack of an indispensable party in this proceeding having been noticed for hearing and heard on March 30, 1954. The plaintiff appearing by M. Silfen, Esq., and the respondent appearing by J. Edward Lumbard, United States Attorney for the Southern District of New York (by Philip M. Drake, Assistant United States Attorney) and the Court having rendered its written opinion, filed on April 9, 1954, it is

Ordered that the said motion be and the same is hereby granted in all respects, together with costs as taxed in the sum of $20.00, and that the respondent have judgment against Mampril Sequeira Pedreiro herein.

Dated: New York, N. Y., April 23rd, 1954.

E. J. DIMOCK, U.S.D.J.

Judgment Entered April 26, 1954.

WILLIAM T. CONNELL, Clerk, U.S. District Court

21 Clerk's Certificate to foregoing transcript omitted "in printing.

22 In United States Court of Appeals
For the Second Circuit

No. 276—October Term, 1953

Docket No. 23091

In the Matter of the Petition for Review of
MAMPRIL SEQUEIRA PEDREIRO, Petitioner-Appellant

against

EDWARD J. SHAUGHNESSY, as District Director of Immigration and Naturalization for the District of New York, Respondent-Appellee

OPINION—July 1, 1954

Before CLARK, FRANK and MEDINA, *Circuit Judges*.

Petitioner appeals from an order dismissing the case for lack of an indispensable party. Dimock, *D. J.* Reversed.

NEMEROFF, JELLINE, DANZIG & PALEY, *Attorneys for Petitioner-Appellant*; Aaron L. Danzig, of Counsel.

J. EDWARD LUMBARD, United States Attorney for the Southern District of New York, *Attorney for Respondent-Appellee*; Philip M. Drake and Lester Friedman, of Counsel.

23 MEDINA, *Circuit Judge*:

This is an action by a deportee for a declaratory judgment and injunctive relief under the Administrative Procedure Act, Section 10, 60 Stat. 243, 5 U.S.C. Sec. 1009. Petitioner having exhausted his administrative remedies seeks a review of the proceedings resulting in a final order of deportation, claiming that his constitutional rights have been violated in that "the evidence adduced * * * was in contravention of * * * the Fifth Amendment in that your petitioner was deprived of due process of law and in that your petitioner was compelled to testify on matters which might tend to incriminate him, such as his entry into the United States and his purposes in coming to the United States."

The merits have not been considered, the court below having dismissed the case on motion pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, as the action was brought against the District Director of Immigration and Naturalization for the District of New York, without joining either the Attorney General or the Commissioner of Immigration and Naturalization.

To those who have spent the greater part of their professional lives manipulating procedural devices in the ebb and flow of practice at the bar it sometimes seems that in the very areas of the law where

simplicity and flexibility of procedure are most indispensable are found a morass of complexities. This case provides an illustration.

The aliens involved in deportation proceedings are often in poor financial circumstances; the validity of final orders of deportation generally, if not always, depends upon questions relating to the alleged infringement of the deportees' constitutional rights; their imprisonment or enlargement on bail and the actual deportation itself affect human relationships of the highest consequence.
24 Under these circumstances it would seem that the courts must be able to spell out some simple formula which will cut through red tape, face realities, and provide an expeditious and inexpensive remedy, with a minimum amount of procedural frills and a maximum amount of attention to the question of whether or not the administrative proceedings against the deportee have conformed to the requirements of due process.

And yet a careful perusal of the numerous decided cases referred to in Judge Dimock's scholarly and reasoned opinion, and certain other authorities cited in the briefs submitted by counsel for the parties, discloses refinement and conflicting views which make it a difficult task to find and apply controlling principles. The traditional remedy of habeas corpus as a means of reviewing the validity of an order of deportation is plainly inapplicable, as petitioner is not in custody, and one cannot blame him for unwillingness to gamble with his liberty which may not readily be regained. While counsel for respondent contend that the question is still open, whether or not a civil action for a declaratory judgment and injunctive relief under the Administrative Procedure Act, Section 10, *supra*, provides an alternative method for testing the validity of a deportation order, we shall follow *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C.A.D.C., 1953), affirmed sub nom. *Brownell* v. *Rubinstein*, 346 U.S. 929 (1954). See *contra*, *Batista* v. *Nicolls*, ——F. 2d ——, decided by the Court of Appeals for the First Circuit on May 19, 1954.

Many decisions support the view that the Attorney General, or the Commissioner of Immigration and Naturalization is an in-
25 dispensable party,[1] but the holding by this Court in *Vaz* v. *Shaughnessy* 28 F. 2d 70 (C. A. 2, 1953), seems distinguisha-

[1] *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C.A. 3, 1950); *Slavik* v *Miller*, 184 F. 2d 575 (C.A. 3, 1950), certiorari denied, 340 U.S. 955 (1951); *Paolo* v. *Garfinkel*, 200 F. 2d 280 (C.A. 3, 1952); *Belizaro* v. *Zimmerman*, 200 F. 2d 282 (C.A. 3, 1952); *Rodriquez* v. *Landon*, 112 F. 2d 508 (C.A. 9, 1954); *Medalha* v. *Shaughnessy*, 102 F. Supp. 950 (D.C.S.D.N.Y., 1954); *Bieus* v. *Commissioner*, 103 F. Supp. 180 (D.C.N.D. Ohio, E.D. 1952); *Corona* v. *Landon*, 111 F. Supp. 191 (D.C.S.D. Cal., C. D, 1953).

ble, as the *Vaz* case involved an attempt by a concededly deportable alien to review an order holding him not eligible for suspension of deportation, essentially a discretionary matter, whereas here petitioner seeks a review of the record on which is based a final order of deportation, on the ground that his constitutional rights have been infringed. The District Director, moreover, especially under the new regulations promulgated on December 17, 1952,[2] plainly is the person to whom has been delegated the power to issue the warrant of deportation and determine the various questions incidental thereto.

The rationale of the cases holding the Commissioner of Immigration and Naturalization or the Attorney General to be an indispensable party in such cases as this boils down to the assertion that the deportee might move to another district and be taken into custody by the District Director there, and the injunction
26 granted in the pending suit would not bar deportation from such other district. In this sense the remedy would be incomplete and there would be no guaranty against circuity of action and delay.

Viewed realistically, however, and with due respect to our brethren of the Third Circuit and others, we think these considerations lack substance. The likelihood of removal to another district seems remote, especially as the principal reason for these numerous proceedings against District Directors, disclosed by the reported cases above referred to, appears to be that the joinder of the Commissioner of Immigration and Naturalization or the Attorney General, whose actual and official residences are in the District of Columbia,

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[2] These regulations were made effective after the date of the filing of the complaint in the *Vaz* case, *supra*, and read as follows:

"Part 243—Deportation of Aliens in the United States.

Sec. 243.1. Issuance of warrants of deportation; country to which alien shall be deported; cost of detention; care and attention of alien—(a) Issuance. In any case in which an order of deportation becomes final a warrant of deportation shall be issued. District directors shall issue warrants of deportation.

(b) Determination of place and cost of deportation and necessity for attendants. District directors shall exercise the authority contained in section 243 of the Immigration and Nationality Act to designate the country to which, and at whose expense an alien in the United States shall be deported, and to determine when an alien's mental or physical condition requires the employment of a person to accompany the alien.

Sec. 243.2. Finality of decision. No appeal shall lie from the decision of the district director in the exercise of the authority described in Sec. 243.1."

would require the venue to be laid in Washington and involve expense which the deportee may be and often is unable to defray. See dictum of Picard, *J.*, in *Rogers* v. *Battlefield*, 115 F. Supp. 953 (D.C.E.D. Mich., 1953). Doubtless the defense would be conducted by the same or equally competent counsel; the same review of the record by appellate courts would be available; and such further proceedings as might be directed to be had would follow in due course. To require the joinder of the Commissioner of Immigration and Naturalization or the Attorney General under these circumstances would, we think, sacrifice substance to mere form and serve no other purpose than perhaps to deny all relief short of habeas corpus to an indigent alien deportee, whose constitutional rights are just as sacred in the eyes of the law as those of a citizen.

If it shall ultimately be found that petitioner is entitled to injunctive relief against the District Director, we believe such relief, even if not as comprehensive as it could be if the Attorney General had been joined, will not only furnish the protection which petitioner solicits and which will afford him adequate protection, but will follow traditional lines, as our courts have always been
27 zealous to prevent public officials from restraining or threatening to restrain the liberty of citizens and aliens alike, in violation of their constitutional rights. This result seems to us to be in harmony with the reasoning of *Williams* v. *Fanning*, 332 U.S. 490 (1947).

The case is remanded to the District Court for further proceedings in accord with this opinion, including consideration of the motions referred to in the opinion below.

Reversed.

28 In United States Court of Appeals for the Second Circuit

HON. CHARLES E. CLARK, HON. JEROME N. FRANK, HON. HAROLD R. MEDINA, *Circuit Judges*.

MAMFRIL SEQUEIRA PEDREIRO, Petitioner-Appellant

v.

EDWARD J. SHAUGHNESSY, District Director of Immigration & Naturalization, Respondent-Appellee

JUDGMENT—July 1, 1954

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged,

and decreed that the order of said District Court be and it hereby is reversed and action remanded for further proceedings in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S.) A. DANIEL FUSARO, Clerk.

29 [File endorsement omitted.]

30 Clerk's Certificate to foregoing transcript omitted in printing.

31 SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 374

EDWARD J. SHAUGHNESSY, as District Director of Immigration and Naturalization for the District of New York, Petitioner

vs.

MAMFRIL SEQUEIRA PEDREIRO

ORDER ALLOWING CERTIORARI—Filed November 15, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Office - Supreme Court, U. S.
FILED
SEP 28 1954
HAROLD B. WILLEY, Clerk

No. — 374

In the Supreme Court of the United States

OCTOBER TERM, 1954

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK, PETITIONER

v.

MAMPRIL SEQUEIRA PEDREIRO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIMON E. SOBELOFF,
Solicitor General,
Department of Justice, Washington 25, D. C.

316505—54——1

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. —

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK, PETITIONER

v.

MAMPRIL SEQUEIRA PEDREIRO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of Edward J. Shaughnessy, as District Director of the Immigration and Naturalization Service for the District of New York, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit reversing the dismissal by the United States District Court for the Southern District of New York of an action for a declaratory judgment and injunctive relief to review the validity of a final order of deportation.

OPINION BELOW

The opinion of the District Court is reported in Appendix B, *infra*, pp. 1b–6b. The opinion in the

Court of Appeals is not yet reported; it is reported in Appendix B, *infra*, pp. 7b–13b.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1954 (App. B, *infra*, p. 13b). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether deportation orders issued under the Immigration and Nationality Act of June 27, 1952, are judicially reviewable other than in habeas corpus proceedings.

2. Assuming that actions other than habeas corpus lie, whether the Attorney General or the Commissioner of Immigration and Naturalization is a necessary party to such action.

STATUTES INVOLVED

The pertinent provisions of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. 1101, *et seq.*, and of the Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. 1001, *et seq.*, are set forth in Appendix A, *infra*, pp. 1a–9a.

STATEMENT

On March 15, 1954, respondent instituted an action in the District Court for the Southern District of New York for a declaratory judgment to review the legality of final deportation order against him (R. 2–5), naming the District Director

of Immigration and Naturalization for the District of New York as party respondent.[1] The petition alleged that the evidence was insufficient to sustain the deportation order, and that respondent was compelled to testify in violation of his privilege against self-incrimination.

The District Director, on March 25, 1954, moved to dismiss the action on the grounds that the court lacked jurisdiction over the subject matter, that there was lacking an indispensible party to the action, i. e., the Commissioner of Immigration and Naturalization, and that the petition failed to state a claim upon which relief could be granted (R. 7). After hearing, the District Court sustained the motion on the ground that either the Attorney General or the Commissioner of Immigration and Naturalization was an indispensible party to the suit, and, on that basis, found it unnecessary to reach the issue of whether a declaratory judgment action was precluded by the Immigration and Nationality Act of 1952 (R. 13–17, 19).

On appeal, the Court of Appeals for the Second Circuit reversed the order of the District Court and remanded the cause for further proceedings (R. 28), holding that an action for declaratory relief under Section 10 of the Administrative

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[1] Respondent's petition alleged that jurisdiction was based on the Immigration and Nationality Act of 1952, and on Section 10 of the Administrative Procedure Act (R. 2).

Procedure Act, 60 Stat. 243, 5 U. S. C. 1009, is available to test the legality of the deportation order, that nothing in the Immigration and Nationality Act of 1952 precludes such relief, and that neither the Attorney General nor the Commissioner of Immigration and Naturalization is an indispensible party to the action (R. 22–27).

REASONS FOR GRANTING THE WRIT

The decision below presents a conflict between circuits in two aspects, *i. e.*, (1) whether remedies other than habeas corpus are available to test the legality of a final deportation order, and (2) whether, assuming that they are, the Attorney General or the Commissioner of Immigration and Naturalization is an indispensible party. Both issues are important in the administration of the immigration laws, and should be resolved to avoid confusion and inequality with respect to the remedies now available to aliens.

1. The holding below follows the opinion of the Court of Appeals for the District of Columbia Circuit in *Rubinstein* v. *Brownell*, 206 F. 2d 449, affirmed by an equally divided Court, 346 U. S. 929.[2] It thus presents again the issue, as yet unresolved by a majority decision of this Court, of whether Section 242 of the Immigration and Nationality Act of 1952, *infra*, pp. 1a–6a, affords a

[2] See the Government's Petition for a Writ of Certiorari and Brief, *Ibid.*, No. 300, O. T. 1953.

broader scope of review of final deportation orders than had obtained prior to the 1952 Act when, under the prior statute, habeas corpus was the sole means of judicial review. See *Heikkila* v. *Barber*, 345 U. S. 229.

Since the *Rubinstein* case was before this Court, the Court of Appeals for the First Circuit in *Batista* v. *Nicolls*, 213 F. 2d 20, has flatly refused to follow the majority opinion of the District of Columbia Circuit in that case, either in its holding or in its interpretation of the legislative history of the new Act. It has affirmed the dismissal of three petitions for declaratory and injunctive relief brought against a district director of the Immigration and Naturalization Service. While the *Batista* opinion discusses separate grounds for dismissal, it is unequivocal in its repudiation of the principle of the *Rubinstein* case, in favor of the rationale of *Heikkila* v. *Barber, supra,* which, on the basis of its analysis of the legislative background of the new Act, the First Circuit finds still applicable to restrict judicial review of final deportation orders to the remedy of habeas corpus. Thus, a rule has been established for the First Circuit at variance with that laid down by the District of Columbia Circuit in the *Rubinstein* case,[3] and by the Second Circuit in the instant case.

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[3] See also, *Lim Fong* v. *Brownell*, No. 12264, C. A. D. C., decided July 22, 1954.

As was indicated in the Government's brief in the *Rubinstein* case (No. 300, O. T. 1953), the interpolation into the 1952 Act of an additional procedure, which would inevitably produce long and unnecessary delays in deportation after a final order has issued, is unwarranted. Such a novel departure in the previous method of review is not justified by the statements of one Congressman apparently relied on in the *Rubinstein* opinion. Congress carried forward into the new Act such traditional terms as "final determination of deportability", and "final order of deportation under administrative processes", and made specific reference to the remedy of habeas corpus, and it is very unlikely that it intended to create by implication a new form of judicial scrutiny in addition to habeas corpus which is historically based on the theory of administrative finality. Also, as was indicated in the Government's brief in the *Rubinstein* case (No. 300, O. T. 1953, pp. 18–30), the rejection by both House and Senate of amendments which would have subjected deportation orders to direct review precludes the inference that Congress intended by silence to create such remedy.

The policy considerations mentioned in the opinion below (Appendix B, *infra*, pp. 9b–10b) are matters for legislative judgment, but not a basis for reading the 1952 Act contrary to the Congressional intent. Recognizing the deficiency of the habeas corpus remedy from the standpoint

of the alien, the Attorney General, on March 10, 1954, in identical letters to the Speaker of the House of Representatives and the Vice-President urged the enactment of legislation to permit direct judicial review of deportation orders.[4] He enclosed the draft of a proposed bill

[4] This letter stated in part:

* * * * *

"Historically, the immigration laws of the United States have never provided for judicial review of orders for the deportation of aliens from the United States. However, the courts have permitted such orders to be challenged in habeas corpus proceedings which are available to aliens after they have been taken into custody pursuant to such orders of deportation. In recent years, it has been suggested by judges and lawyers and by officials of this Department that an alien should be able to obtain judicial review of an order for his deportation as soon as it has been issued and without waiting until he has been taken into custody. I concur in this view and believe that the attached legislative proposal will effectively accomplish this desirable change in the law.

"Moreover, there is a present need for clarification on this subject. In 1953, the Court of Appeals for the District of Columbia, in *Rubinstein* v. *Brownell*, 206 F. 2d 449, held that deportation orders issued under the Immigration and Nationality Act of 1952 are reviewable in actions for declaratory judgments as well as in habeas corpus. This decision was affirmed by an equally divided Supreme Court on January 11, 1954, thus leaving the question in doubt. The Declaratory Judgment Act contains no provisions for expediting the determination of cases involving deportation orders, or for reasonably distributing such cases among the Federal courts. Thus, only specific legislation can provide in this area a judicial remedy other than habeas corpus and at the same time deal adequately with such important aspects of review as orderly venue, expedition, and the prevention of repetitious judicial proceedings." [Press Release of the Attorney General of the United States, March 10, 1954.]

which was designed to settle problems of party and venue, expedite the proceedings, and prevent repetitious litigation, so as to avoid the difficulties which arise if review other than by habeas corpus is read into the present statute (see discussion in the Brief for the Government in the *Rubinstein* case, No. 300, O. T. 1953, pp. 39–41). Congress, however, did not enact such legislation and we do not know whether it will do so at its next session or in the immediate future. In the circumstances, it is necessary that the question of remedy unresolved by the *Rubinstein* case be settled by this Court if aliens in all parts of the country are to have equality in the remedies available to them.

2. Having decided that declaratory relief under Section 10 of the Administrative Procedure Act, 50 U. S. C. 1009, is available by virtue of Section 242 (a) of the Immigration and Nationality Act of 1952, the Court of Appeals then held that such action would be against the subordinate District Director of the Immigration and Naturalization Service without joinder of either the Commissioner of Immigration and Naturalization or the Attorney General of the United States. In this ruling, the Court of Appeals established for the Second Circuit a position directly in conflict with various holdings of the Third Circuit (e. g., *Paolo* v. *Garfinkel*, 200 F. 2d 280; *Belizaro* v. *Zimmerman*, 200 F. 2d 282; *Slavik* v. *Miller*, 184 F. 2d

575, certiorari denied, 340 U. S. 955; *Podovinnikoff* v. *Miller*, 179 F. 2d 937, and of the Ninth Circuit (e. g., *Rodriguez* v. *Landon*, 212 F. 2d 508).[3] This conflict between those circuits primarily concerned with immigration and naturalization matters further creates confusion and inequality in the administration of the new Act.

CONCLUSION

It is therefore respectfully submitted that this petition for a writ of certiorari be granted.

SIMON E. SOBELOFF,
Solicitor General.

SEPTEMBER 1954.

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[3] The Government's position with respect to this issue has been set forth in its briefs in *Heikkila* v. *Barber*, No. 426, O. T. 1952, pp. 14–6, and *Martinez* v. *Neely*, No. 218, O. T. 1952, pp. 46–56.

APPENDICES

APPENDIX A

Statutes Involved

1. The Immigration and Nationality Act, 66 Stat. 163, 8 U. S. C. 1101, *et seq.*, provides in pertinent part:

> Sec. 242. (a) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing

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in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigra-

tion officer shall have authority to present evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determin-

ing the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained,

released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is hereby authorized, notwithstanding section 3709 of the Revised Statutes, as amended (41 U. S. C. 5), or section 322 of the Act of June 30, 1932, as amended (40 U. S. C. 278a), to expend, from the appropriation provided for the administration and enforcement of the immigration laws, such

amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, operation, remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

SEC. 360. * * *

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations

for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

2. Section 10 of the Administrative Procedure Act, 60 Stat. 237, 243, 5 U.S.C. 1009, provides in part as follows:

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(a) *Right of Review.*—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) *Form and Venue of Action.*—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) *Reviewable Acts.*—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

* * * * *

(e) *Scope of Review.*—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power,

privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B

United States District Court, Southern District of New York

IN THE MATTER OF THE PETITION FOR REVIEW OF MAMPRIL SEQUEIRA PEDREIRO, PETITIONER

v.

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK, RESPONDENT

Appearances: Nemeroff, Jelline, Danzig & Paley, Esqs., Attorneys for Petitioner, 350 Fifth Avenue, New York 1, N. Y. Honorable J. Edward Lumbard, United States Attorney for the Southern District of New York, Attorney for Respondent. Philip M. Drake, Esq., Assistant United States Attorney, of Counsel.

Opinion

DIMOCK, D. J.:

Pedreiro brings this action to review an order of the Board of Immigration Appeals, to declare null and void an order of a hearing officer adopted by the Assistant Commissioner, and to obtain a temporary injunction staying execution of an order of deportation pending final determination of the issues herein. He adds the usual prayer for other and further relief. He cites as author-

ity for his procedure section 10 of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. Sec. 1009.

The District Director of Immigration and Naturalization for this District of New York who is the only adverse party named by Pedreiro makes this motion to dismiss on the ground that there is a lack of an indispensable party, namely, the Commissioner of Immigration and Naturalization, and upon the further ground that habeas corpus is the exclusive means for reviewing deportation orders.

Taking up the question of nonjoinder of parties let us see just what Pedreiro's situation is. He alleges that, after the issuance of a warrant of arrest, a deportation hearing was conducted on December 4, 1951, before a hearing officer of the Immigration and Naturalization Service at New York City; that the Hearing Officer, on December 4, 1951, rendered a decision and made an order directing that he be deported on the charges stated in the warrant of arrest; that exceptions to the Hearing Officer's decision and order were duly filed, and on or about May 5, 1952, the Assistant Commissioner, Adjudication Division, adopted the order; that he appealed to the Board of Immigration Appeals but the Board, on or about June 24, 1953, ordered the appeal dismissed and that two subsequent motions to the Board to reopen the hearings were made and denied.

The charges in the warrant of arrest are not stated.

Without further specification, the order of deportation is attacked on the ground that the "evidence adduced at said hearing was in contraven-

tion of the Constitution of the United States and the Fifth Amendment in that" he "was deprived of due process of law and in that" he "was compelled to testify on matters which might tend to incriminate him such as his entry into the United States and his purposes in coming to the United States."

It was held in *Vaz v. Shaughnessy*, D. C. S. D. N. Y., 117 F. Supp. 778, aff'd., 2 Cir. 208 F. 2d 70, that the Commissioner of Immigration and Naturalization and/or the Attorney General were indispensable parties to a proceeding brought under section 10 of the Administrative Procedure Act for (1) a declaratory judgment that the applicant was eligible for suspension of deportation, (2) an injunction against the District Director of Immigration and Naturalization and (3) a direction that the District Director reopen the deportation hearing for the purpose of permitting an application for suspension of deportation. In that case the alien's application had been considered and denied by a hearing officer, the Assistant Commissioner of Immigration and Naturalization and the Board of Immigration Appeals. It was there held that, to grant the relief sought and to effectively dispose of the controversy, the court would have to have jurisdiction over the superior officer. It was said that the court there could not, without the presence of the superior officer, grant all the relief that the plaintiff sought. Indeed no effective relief could have been given. The only effective relief would be that which would protect the alien in other Districts and that could not be obtained

without getting jurisdiction over the superior officer.

In a proceeding to review a deportation order like the one at bar it is still clearer that the superior officer is a necessary party. Indeed before the *Vaz* case there were many which held that the Commissioner of Immigration and Naturalization was an indispensable party in actions to review orders of deportation. *Paolo* v. *Garfinkel*, 3 Cir., 200 F. 2d 280. *Slavik* v. *Miller*, 3 Cir., 184 F. 2d 575, cert. denied, 340 U. S. 955. *Pedoeimikoff* v. *Miller*, 3 Cir., 179 F. 2d 937. *Medalie* v. *Shaughnessy*, D. C. S. D. N. Y., 102 F. Supp. 950. *Bivas* v. *Commissioner of Immigration and Naturalization*, D. C. N. D. Ohio, 103 F. Supp. 180. See *Connor* v. *Miller*, 2 Cir., 178 F. 2d 755.

Here, however, Pedreiro says that his case is different; that he proceeds on constitutional ground and that the District Director proposes to deport him without warrant in law. Under those circumstances, he says, he need not join any one else in his suit to prevent that deportation. It may be true that Pedreiro has a remedy against the District Director all alone but if so that remedy is habeas corpus. If he persists in proceeding under the Administrative Procedure Act he presents a case no more favorable for elimination of superior officers than the *Vaz* case. The relief he seeks includes a review of the action of the Board of Immigration Appeals. A direct review of that action is impossible without the presence of the Attorney General or the Com-

missioner of Immigration and Naturalization. Even if Pedreiro would be satisfied to let the order of the Board stand and rely on a declaration that it was invalid as between him and the District Director, that declaration would be ineffective against the superior officers. *Marshall v. Crotty*, 1 Cir., 185 F. 2d 622, 627-628. The only effective relief would be that which would protect him in other Districts and that could not be obtained without getting jurisdiction over the superior officers. Even if the determination were that the order was not merely improper but indeed unconstitutional and utterly void, that determination would impart to the order no magic through which its sentence could reach out and bind persons who were not before the court.

All of the foregoing discussion has proceeded upon the assumption that the remedy chosen by Pedreiro is available for review of deportation orders. Since I conclude that, even if it is available for that purpose, it must be denied for lack of a necessary party, I can, as did the Court of Appeals in the *Vaz* case, dispose of the matter without passing on the question whether the remedy is available. It is noteworthy, however, that since the Court of Appeals decision in the *Vaz* case, the United States Supreme Court has, by an evenly divided court, affirmed a decision of the District of Columbia Court of Appeals holding that the Nationality Act of 1952 makes the remedy under the Administrative Procedure Act available in deportation order cases. *Rubinstein*

v. *Brownell*, 206 F. 2d 449, aff'd sub nom. *Brownell* v. *Rubinstein*, 346 U. S. 929.

Since the instant case must be dismissed, Pedreiro's motions for a stay and for enlargement on bond fall with the dismissal and are denied without further consideration.

Dated: April 8, 1954.

E. J. DIMOCK,
United States District Court.

United States District Court, Southern District of New York

IN THE MATTER OF THE PETITION FOR REVIEW OF MAMPRIL SEQUEIRA PEDREIRO, PETITIONER

v.

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK, RESPONDENT

The respondent's motion for an order dismissing the above entitled action on the ground that there is a lack of an indispensable party in this proceeding having been noticed for hearing and heard on March 30, 1954. The plaintiff appearing by M. Silfen, Esq., and the respondent appearing by J. Edward Lumbard, United States Attorney for the Southern District of New York (by Philip M. Drake, Assistant United States Attorney) and the Court having rendered its written opinion, filed on April 9, 1954, it is

Ordered that the said motion be and the same is hereby granted in all respects, together with costs

as taxed in the sum of $20.00, and that the respondent have judgment against Mampril Sequeira Pedreiro herein.

Dated: New York, N. Y., April 23rd, 1954.

E. J. DIMOCK,
U. S. D. J.

Judgment entered April 26, 1954.

WILLIAM T. CONNELL,
Clerk, U. S. District Court.

United States Court of Appeals for the Second Circuit

No. 276—OCTOBER TERM, 1953

(Argued May 4, 1954. Decided July 1, 1954)

Docket No. 23091

IN THE MATTER OF THE PETITION FOR REVIEW OF MAMPRIL SEQUEIRA PEDREIRO, PETITIONER-APPELLANT

v.

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK, RESPONDENT-APPELLEE

Before CLARK, FRANK and MEDINA, *Circuit Judges*

Petitioner appeals from an order dismissing the case for lack of an indispensable party. Dimock, D. J. Reversed.

Nemeroff, Jelline, Danzig & Paley, Attorneys for Petitioner-Appellant; Aaron L. Danzig, of Counsel. J. Edward Lumbard, United States

Attorney for the Southern District of New York, Attorney for Respondent-Appellee; Philip M. Drake and Lester Friedman, of Counsel.

MEDINA, *Circuit Judge:*

This is an action by a deportee for a declaratory judgment and injunctive relief under the Administrative Procedure Act, Section 10, 60 Stat. 243, 5 U. S. C. Sec. 1009. Petitioner having exhausted his administrative remedies seeks a review of the proceedings resulting in a final order of deportation, claiming that his constitutional rights have been violated in that "the evidence adduced * * * was in contravention of * * * the Fifth Amendment in that your petitioner was deprived of due process of law and in that your petitioner was compelled to testify on matters which might tend to incriminate him, such as his entry into the United States and his purposes in coming to the United States."

The merits have not been considered, the court below having dismissed the case on motion pursuant to Rule 12 (b) of the Federal Rules of Civil Procedure, as the action was brought against the District Director of Immigration and Naturalization for the District of New York, without joining either the Attorney General or the Commissioner of Immigration and Naturalization.

To those who have spent the greater part of their professional lives manipulating procedural devices in the ebb and flow of practice at the bar it sometimes seems that in the very areas of the law where simplicity and flexibility of procedure are most indispensable are found a morass of complexities. This case provides an illustration.

The aliens involved in deportation proceedings are often in poor financial circumstances; the validity of final orders of deportation generally, if not always, depends upon questions relating to the alleged infringement of the deportees' constitutional rights; their imprisonment or enlargement on bail and the actual deportation itself affect human relationships of the highest consequence. Under these circumstances it would seem that the courts must be able to spell out some simple formula, which will cut through red tape, face realities, and provide an expeditious and inexpensive remedy, with a minimum amount of procedural frills and a maximum amount of attention to the question of whether or not the administrative proceedings against the deportee have conformed to the requirements of due process.

And yet a careful perusal of the numerous decided cases referred to in Judge Dimock's scholarly and reasoned opinion, and certain other authorities cited in the briefs submitted by counsel for the parties, discloses refinements and conflicting views which make it a difficult task to find and apply controlling principles. The traditional remedy of habeas corpus as a means of reviewing the validity of an order of deportation is plainly inapplicable, as petitioner is not in custody, and one cannot blame him for unwillingness to gamble with his liberty which may not readily be regained. While counsel for respondent contend that the question is still open, whether or not a civil action for a declaratory judgment and injunctive relief under the Administrative Procedure Act, Section 10, *supra*, provides an alternative

method for testing the validity of a deportation order, we shall follow *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C. A. D. C., 1953), affirmed sub nom. *Brownell* v. *Rubinstein*, 346 U. S. 929 (1954). See *contra*, *Batista* v. *Nicolis*, —— F. 2d ——, decided by the Court of Appeals for the First Circuit on May 19, 1954.

Many decisions support the view that the Attorney General, or the Commissioner of Immigration and Naturalization, is an indispensable party,[1] but the holding by this Court in *Vaz* v. *Shaughnessy*, 208 F. 2d 70 (C. A. 2, 1953), seems distinguishable, as the *Vaz* case involved an attempt by a concededly deportable alien to review an order holding him not eligible for suspension of deportation, essentially a discretionary matter, whereas here petitioner seeks a review of the record on which is based a final order of deportation, on the ground that his constitutional rights have been infringed. The District Director, moreover, especially under the new regulations promulgated on December 17, 1952,[2] plainly is the

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[1] *Podovinnikoff* v. *Miller*, 179 F. 2d 937 (C. A. 3, 1950); *Slavik* v. *Miller*, 184 F. 2d 575 (C. A. 3, 1950), certiorari denied, 340 U. S. 955 (1951); *Paolo* v. *Garfinkel*, 200 F. 2d 280 (C. A. 3, 1952); *Belizaro* v. *Zimmerman*, 200 F. 2d 282 (C. A. 3, 1952); *Rodiguez* v. *Landon*, 112 F. 2d 508 (C. A. 9, 1954); *Medalha* v. *Shaughnessy*, 102 F. Supp. 950 (D. C. S. D. N. Y., 1951); *Birns* v. *Commissioner*, 103 F. Supp. 180 (D. C. N. D. Ohio, E. D., 1952); *Corona* v. *Landon*, 111 F. Supp. 191 (D. C. S. D. Cal., C. D., 1953).

[2] These regulations were made effective after the date of the filing of the complaint in the *Vaz* case, *supra*, and read as follows:

"Part 243—Deportation of Aliens in the United States.

person to whom has been delegated the power to issue the warrant of deportation and determine the various questions incidental thereto.

The rationale of the cases holding the Commissioner of Immigration and Naturalization or the Attorney General to be an indispensable party in such cases as this boils down to the assertion that the deportee might move to another district and be taken into custody by the District Director there, and the injunction granted in the pending suit would not bar deportation from such other district. In this sense the remedy would be incomplete and there would be no guaranty against circuity of action and delay.

Viewed realistically, however, and with due respect to our brethren of the Third Circuit and others, we think these considerations lack substance. The likelihood of removal to another district seems remote, especially as the principal

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"SEC. 243.1. Issuance of warrants of deportation; country to which alien shall be deported; cost of detention; care and attention of alien—(a) Issuance. In any case in which an order of deportation becomes final a warrant of deportation shall be issued. District directors shall issue warrants of deportation.

"(b) Determination of place and cost of deportation, and necessity for attendants. District directors shall exercise the authority contained in section 243 of the Immigration and Nationality Act to designate the country to which, and at whose expense an alien in the United States shall be deported, and to determine when an alien's mental or physical condition requires the employment of a person to accompany the alien.

"SEC. 243.2. Finality of decision. No appeal shall lie from the decision of the district director in the exercise of the authority described in Sec. 243.1."

reason for these numerous proceedings against District Directors, disclosed by the reported cases above referred to, appears to be that the joinder of the Commissioner of Immigration and Naturalization or the Attorney General, whose actual and official residences are in the District of Columbia, would require the venue to be laid in Washington and involve expense which the deportee may be and often is unable to defray. See dictum of Picard, *J.*, in *Ragni* v. *Butterfield*, 115 F. Supp. 953 (D. C. E. D. Mich., 1953). Doubtless the defense would be conducted by the same or equally competent counsel; the same review of the record by appellate courts would be available; and such further proceedings as might be directed to be had would follow in due course. To require the joinder of the Commissioner of Immigration and Naturalization or the Attorney General under these circumstances would, we think, sacrifice substance to mere form and serve no other purpose than perhaps to deny all relief short of habeas corpus to an indigent alien deportee, whose constitutional rights are just as sacred in the eyes of the law as those of a citizen.

If it shall ultimately be found that petitioner is entitled to injunctive relief against the District Director, we believe such relief, even if not as comprehensive as it could be if the Attorney General had been joined, will not only furnish the protection which petitioner solicits and which will afford him adequate protection, but will follow traditional lines, as our courts have always been zealous to prevent public officials from restraining or threatening to restrain the liberty of citizens

and aliens alike, in violation of their constitutional rights. This result seems to us to be in harmony with the reasoning of *Williams* v. *Fanning*, 332 U. S. 490 (1947).

The case is remanded to the District Court for further proceedings in accord with this opinion, including consideration of the motions referred to in the opinion below.

Reversed.

United States Court of Appeals for the Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of July one thousand nine hundred and fifty-four.

Present: Hon. Charles E. Clark, Hon. Jerome N. Frank, Hon. Harold R. Medina, Circuit Judges.

MAMPRIL SEQUEIRA PEDREIRO, PETITIONER-APPELLANT

v.

EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, RESPONDENT-APPELLEE

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is reversed and action remanded for further proceedings in accordance with the opinion of this Court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

(S) A. DANIEL FUSARO, *Clerk.*

Judgment filed July 1, 1954.

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No. 374

In the Supreme Court of the United States

OCTOBER TERM, 1954

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK, PETITIONER

v.

MAMPRIL SEQUEIRA PEDREIRO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 374

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK, PETITIONER

v.

MAMPRIL SEQUEIRA PEDREIRO

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

OPINION BELOW

The opinion of the Court of Appeals (R. 8–11) is reported at 213 F. 2d 768. The opinion of the District Court (R. 4–6) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1954 (R. 11–12). The petition for a writ of certiorari was filed September 28, 1954, and was granted November 15, 1954 (R. 12). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether deportation orders issued under the Immigration and Nationality Act of 1952 may be challenged in the courts otherwise than by habeas corpus proceedings.

2. If the answer to question (1) is in the affirmative, whether the Commissioner of Immigration and Naturalization is an indispensable party to the action.

STATUTES INVOLVED

The pertinent portions of the Immigration and Nationality Act of 1952 (66 Stat. 208, 8 U. S. C. 1252) and of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009), are set forth in the Appendix, infra, pp. 47–55.

STATEMENT

On March 15, 1954, respondent filed, in the District Court for the Southern District of New York, a petition seeking a judicial review of the proceedings which had resulted in the final deportation order against him (R. 1–3).[1] Specifically, the petition asked the court to review the order of the Board of Immigration Appeals, to declare the order of the hearing officer null and void, and to issue a temporary injunction restraining the execution of the deportation order

[1] Respondent's petition alleged that jurisdiction was based on the Immigration and Nationality Act of 1952, and on Section 10 of the Administrative Procedure Act (R. 1).

pending court review (*ibid.*). The petition named the District Director of Immigration and Naturalization for the District of New York as the sole adverse party (R. 1). It stated that on December 4, 1951, a hearing officer rendered a decision ordering respondent's deportation, to which respondent filed exceptions with the District Director; that on May 5, 1952, the Assistant Commissioner, Adjudications Division, adopted the hearing officer's decision; and that on June 24, 1953, the Board of Immigration Appeals ordered petitioner's appeal therefrom dismissed (R. 1–2). Respondent contended that his constitutional rights had been violated in that "the evidence adduced * * * was in contravention of * * * the Fifth Amendment in that your petitioner was deprived of due process of law" and "compelled to testify on matters which might tend to incriminate him such as his entry into the United States and his purposes in coming to the United States," and that there was "no legal evidence" to support the deportation order (R. 1, 2).

On March 25, 1954, the District Director moved, pursuant to Rule 12 (b), F. R. Civ. P., to dismiss the action on the grounds that the court lacked jurisdiction over the subject matter, that there was lacking an indispensable party to the action, *i. e.*, the Commissioner of Immigration and Naturalization, and that the petition failed to state

a claim upon which relief could be granted (R. 3). After a hearing, the District Court sustained the motion on the ground that either the Attorney General or the Commissioner of Immigration and Naturalization was an indispensable party to the suit, and, on that basis, found it unnecessary to reach the issue of whether the action was precluded by the Immigration and Nationality Act of 1952 (R. 4–7).

On appeal, the Court of Appeals for the Second Circuit reversed the order of the District Court and remanded the cause for further proceedings (R. 11–12), holding, on the authority of *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C. A. D. C.), affirmed by an evenly divided Court, 346 U. S. 929 (*Batista* v. *Nicolls*, 213 F. 2d 20 (C. A. 1), *contra*), that an action for declaratory relief under Section 10 of the Administrative Procedure Act is available to test the legality of the deportation order, and that nothing in the Immigration and Nationality Act of 1952 precludes such relief; and that neither the Attorney General nor the Commissioner of Immigration and Naturalization is an indispensable party to the action (R. 8–11).

SUMMARY OF ARGUMENT

I

Congress has reenacted in Section 242 (b) of the Immigration and Nationality Act of 1952 the provision that in deportation cases "the decision of the Attorney General shall be final." In *Heik-*

kila v. *Barber*, 345 U. S. 229, this Court held that identical language in the Immigration Act of 1917 precluded challenge of deportation orders in the courts except in habeas corpus proceedings, and made inapplicable the judicial review provisions of Section 10 of the Administrative Procedure Act which by its terms applies "Except so far as * * * statutes preclude judicial review."

In the *Heikkila* decision, it was pointed out that the term "final," as used in immigration legislation, has had a long history, "both in the statutes and in the decisions of this Court," precluding court intervention except in habeas corpus proceedings. The reenactment of this finality provision in the 1952 Act compels the conclusion that deportation orders continue to be reviewable by the courts only by way of habeas corpus.

Only the most conclusive evidence of a contrary Congressional purpose would warrant disregarding the long-established meaning of the express statutory language. No such intent is shown in the legislative history. That history shows that Congress was unwilling, at least in the absence of further study, to make a change in the existing law with respect to judicial review of deportation proceedings; particularly, it rejected amendments which would have extended the means of judicial review.

In the comprehensive 1950 report of the Senate Committee on the Judiciary (S. Rep. 1515, 81st

Cong., 2d Sess.), entitled *The Immigration and Naturalization Systems of the United States,* which embodies the Congressional understanding of existing law upon which the 1952 Act was predicated, it was stated that "Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service." In making this statement, the report anticipated the decision of this Court in *Heikkila* v. *Barber, supra,* and it either rejected or ignored the prior decisions of the lower courts in *United States ex rel. Trinler* v. *Carusi,* 166 F. 2d 457 (C. A. 3) and *Kristensen* v. *McGrath,* 179 F. 2d 796 (C. A. D. C.), which held that Section 10 of the Administrative Procedure Act had made deportation orders reviewable in proceedings other than habeas corpus.

Again, in its subsequent S. Rep. 1137, 82nd Cong., accompanying the bill which became the Immigration and Nationality Act of 1952, the committee stated that the Act was not intended "to expand judicial review in immigration cases beyond that under existing law," indicating no change, after S. Rep. 1515, in its view of what the "existing law" was. This completely refutes the speculation of the Court of Appeals in *Rubinstein* v. *Brownell,* 206 F. 2d 449, 454, fn. 16 (C. A. D. C.), upon which the court below relied, that S. Rep. 1137, in speaking of "existing law," was referring to the decisions of the Courts of

Appeals which favored direct judicial review of deportation orders.

During the House debate, Representative Meader introduced an amendment to delete the provision of Section 242 (a) that the Attorney General's decision shall be "final" and to provide instead that "the order of deportation shall be subject to review by any court of competent jurisdiction." This was defeated. During the Senate debates, the general understanding was that the Act did not provide for review beyond habeas corpus. Senators Lehman, Moody, and Morse offered amendments which would have accomplished the result achieved below. Each of these amendments was rejected. While the debate on these amendments, particularly Congressman Walter's discussion in the House, tended to be confusing because it dealt in part with matters in addition to judicial review, it seems clear that the House and Senate were both unwilling to make changes in the review of deportation orders without further study.

The Court of Appeals in the *Rubinstein* case, *supra*, found in incidental references to "judicial review" in Section 242 (c) and (e), dealing with the time period for the execution of deportation orders, support for its conclusion that the Act provided for direct judicial review. The court believed these references indicated that Congress intended to provide for "judicial review" as such, rather than merely to refer to the historic method

of testing deportation procedures through habeas corpus. But, it is much more probable that Congress was simply recognizing that the actual deportation of an alien is usually deferred during judicial examination of the deportation order in habeas corpus proceedings. The Court of Appeals in the *Rubinstein* case also thought that Section 360 (c) of the Act expressly limited review of exclusion orders to habeas corpus, from which it concluded that Congress did not intend so to limit the review of deportation orders. This deduction is erroneous in that Section 360 (c) does not deal with exclusion of aliens generally, but provided a new and restrictive method by which persons without the United States could assert claims of American citizenship. Exclusion orders generally are governed by Section 236 (c) which, like the former exclusion statute which was before this Court in *Tom We Shung* v. *Brownell*, 346 U. S. 906, provides that the administrative decision in exclusion cases shall be "final."

Taking the legislative history of the Act as a whole, it is highly unlikely that Congress would have legislated by implication to make a novel departure from the historical method of review of deportation orders by habeas corpus. If it had, it surely would have made some provision for the procedural problems created by such departure, such as venue, expedition in determination of petitions for review, and the prevention of abuses by repetitious judicial proceedings.

II

Assuming, *arguendo*, that a final deportation order may be reviewed apart from habeas corpus proceedings, such review can be had only in an action brought against the Commissioner of Immigration and Naturalization in the District of Columbia. The relief sought by respondent is a review on the merits of a deportation order which runs to any director in whose district respondent may be found. The attack goes to its validity, not only as specific authority for the anticipated action of petitioner, but also as general authority for the possible action by any other district director. Since a disposition of the action would inevitably affect his public duties, the Commissioner has a predominant interest in the subject matter of the action. Therefore, in accordance with traditional principles of practice, he should be considered an indispensable party to such action so as to insure him an opportunity to defend that interest. Cf. *Commonwealth Trust Co.* v. *Smith*, 266 U. S. 152; *Plested* v. *Abbey*, 228 U. S. 42, 50–51; *Minnesota* v. *Northern Securities Co.*, 184 U. S. 199; *Brown* v. *Christman*, 126 F. 2d 625 (C. A. D. C.); Rule 19 (a), F. R. Civ. Proc. Moreover, since a decree in the instant case would not preclude directors in other districts from deporting respondent, if he should be found in any of their districts, it would not expend "itself on the subordinate official who is

before the court", and, therefore, it could not "effectively grant the relief desired." *Williams* v. *Fanning*, 332 U. S. 490, 492. This is the holding of the courts of appeals in the Third and Ninth Circuits. *Paolo* v. *Garfinkel*, 200 F. 2d 280 (C. A. 3); *Rodriguez* v. *Landon*, 212 F. 2d 508 (C. A. 9).

ARGUMENT

I. Deportation orders are subject to review by the courts only in habeas corpus proceedings

A. Under the rationale of *Heikkila* v. *Barber*, 345 U. S. 229, the provision of Section 242 (b) of the Immigration and Nationality Act of 1952 that in deportation cases the decision of the Attorney General shall be "final" deprived the District Court of jurisdiction to review the order for respondent's deportation in an action under the Administrative Procedure Act

This case presents the issue, unresolved because of the equal division of this Court in *Rubinstein* v. *Brownell*, 346 U. S. 929, as to whether Section 242 (b) of the Immigration and Nationality Act of 1952, forbids the review of deportation orders by proceedings other than habeas corpus. Section 242 (b) provides that, "In any case in which an alien is ordered deported from the United States under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final." Under the rationale of this Court's decision with respect to an earlier version of the law in *Heikkila* v. *Barber*, 345 U. S. 229, the command of the 1952 Act that in deportation cases the Attorney General's decision shall be "final" must mean that deportation orders may

be challenged in the courts only in habeas corpus proceedings. This view is supported by the direct holding of the Court of Appeals for the First Circuit in *Batista* v. *Nicolls*, 213 F. 2d 20.

In *Heikkila* v. *Barber, supra,* an alien who had been ordered deported under the Immigration Act of 1917 sought judicial review of the deportation order in an action for review under Section 10 of the Administrative Procedure Act. Looking to the provision of Section 19 (a) of the 1917 Act that "In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Attorney General shall be final," this Court concluded that Congress had denied judicial intervention in deportation cases except to the extent provided by habeas corpus proceedings made available by the Constitution. Accordingly, it was held that deportation orders fell within the introductory provision of Section 10 of the Administrative Procedure Act excepting administrative decisions from judicial review "so far as (1) statutes preclude" such review, with the result that such orders continued to be challengeable in the courts only in habeas corpus proceedings, notwithstanding the Administrative Procedure Act.

Reviewing the history of the statutory provisions that in deportation cases the decision of the Attorney General shall be "final," this Court noted (345 U. S. at 233–235):

That the Attorney General's decisions are "final" does not settle the question. The appellant properly emphasizes the ambiguity in that term. Read alone, it might refer to the doctrine requiring exhaustion of administrative remedies before judicial process can be invoked. But "final," as used in immigration legislation, has a history, both in the statutes and in the decisions of this Court. It begins with § 8 of the Immigration Act of 1891, 26 Stat. 1085, which provided in part that "All decisions made by the inspection officers or their assistants touching the right of any alien to land, when adverse to such right, shall be final unless appeal be taken to the superintendent of immigration, whose action shall be subject to review by the Secretary of the Treasury." * * * With changes unimportant here, this finality provision was carried forward in later immigration legislation. See, e. g., § 25 of the 1903 Act, 32 Stat. 1220, and § 25 of the 1907 Act, 34 Stat. 906. During these years, the cases continued to recognize that Congress had intended to make these administrative decisions nonreviewable to the fullest extent possible under the Constitution. * * *

Read against this background of a quarter of a century of consistent judicial interpretation, § 19 of the 1917 Immigration Act, 39 Stat. 889, clearly had the effect of precluding judicial intervention in deportation cases except insofar as it was required by the Constitution. And the de-

> cisions have continued to regard this point as settled. *Kessler* v. *Strecker*, 307 U. S. 22, 34 (1939); *Bridges* v. *Wixon*, 326 U. S. 135, 149, 166, 167 (1945); *Estep* v. *United States*, 327 U. S. 114, 122, 123, n. 14 (1946); *Sunal* v. *Large*, 332 U. S. 174, 177, n. 3 (1947). Clearer evidence that for present purposes the Immigration Act of 1917 is a statute precluding judicial review would be hard to imagine. * * *

New legislation is to be construed in the setting of existing law and practice. See *Stark* v. *Wickard*, 321 U. S. 288, 309; *Burnet* v. *Harmel*, 287 U. S. 103, 108; *United States* v. *Sanges*, 144 U. S. 310, 311. The reenactment, practically verbatim, in Section 242 (b) of the 1952 Act of the "final" clause of the 1917 Act which was before this Court in *Heikkila* compels the conclusion that under the new Act deportation orders continue to be challengeable in the courts only in habeas corpus, and may not be reviewed in actions under the Administrative Procedure Act. See *Batista* v. *Nicolls*, 213 F. 2d 20, 22 (C. A. 1).[2] This conclusion does not rest solely upon the reenactment of the finality clause. As is pointed out *infra*,

[2] The District Courts generally have considered the rationale of *Heikkila* v. *Barber*, *supra*, applicable under the 1952 Act. *Ng Gwong Dung* v. *Brownell*, 112 F. Supp. 673 (S. D. N. Y.); *Mirabel* v. *Glover* (D. P. R., Civ. No. 8445), June 18, 1953; *Sursos* v. *Zimmerman* (E. D. Pa., Civ. No. 14913), March 31, 1953; *Hyun* v. *Landon* (S. D. Cal., No. 15693–T), July 17, 1953; *Fougerouse* v. *Brownell* (D. Ore., Civ. No. 7328), January 18, 1954.

Congress voted down proposals to make specific provision for court review. Moreover, in modern times, Congress ordinarily makes detailed arrangements (in such respects as timing and venue) for direct judicial review where such review is contemplated. See Davis, *Administrative Law* (1951), pp. 724–729. The failure of Congress to make such provision in the comprehensive revision of the immigration laws in 1952 is strong confirmation that it did not contemplate judicial intervention in deportation cases except in habeas corpus proceedings in accordance with well-established rules. Cf. *French* v. *War Contracts Price Adjustment Board*, 182 F. 2d 560, 562 (C. A. 9).

B. The legislative history of the 1952 Act confirms that Congress was unwilling to make deportation orders reviewable by the courts in proceedings other than habeas corpus

The accepted meaning of the term "final" with respect to deportation orders could be overcome only by clear evidence of congressional intent to modify it. There is no expression of such purpose in the language of the statute. The phraseology and structure of the reviewability provisions are so clear that resort to legislative history ought to be unnecessary. However, since the court below relied upon the reasoning in *Rubinstein* v. *Brownell*, 206 F. 2d 449 (C. A. D. C.), where the Court of Appeals for the District of Columbia Circuit rested in large part upon statements made in the course of the long Congressional debates,

an analysis of the legislative history of the 1952 Act is necessary. That legislative history shows that Congress was unwilling, at least in the absence of further study, to make a change in the existing law with respect to judicial review of deportation proceedings; in particular, it rejected amendments which would have extended the right of judicial review.

1. *The Senate Reports.* The Immigration and Nationality Act of 1952 was preceded by extensive Congressional studies of the pre-existing laws and their operation. The results of these studies are contained in S. Rep. 1515, 81st Cong., 2d Sess., dated April 20, 1950, a report of the Senate Committee on the Judiciary entitled *The Immigration and Naturalization Systems of the United States,* made pursuant to a Senate "Resolution To Make An Investigation of the Immigration System" (S. Res. 137, 80th Cong., 1st Sess.). This report expresses the Congressional understanding of the prior law upon which the 1952 Act was predicated. It contains the following statement (p. 629):

> *Judicial review*
>
> Once the order and warrant of deportation are issued, the administrative process is complete. Under the fifth amendment to the Constitution, the "due process" provision, the alien may, however, petition for a writ of habeas corpus. In a habeas corpus proceeding, based on a deportation case, the court determines whether or not

> there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is substantial evidence to support the order of deportation. *Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service.* The dismissal of an application for a writ of habeas corpus is not a bar to the filing of another application before another judge. [Emphasis added.]

It is significant that the quoted statement, made in 1950, anticipates this Court's decision in *Heikkila v. Barber, supra,* and that it either rejects or ignores the prior decisions of the Courts of Appeals for the Third and District of Columbia Circuits, rendered in 1948 and 1949 respectively, holding that Section 10 of the Administrative Procedure Act had made deportation orders reviewable in proceedings other than habeas corpus. *United States ex rel. Trinler* v. *Carusi,* 166 F. 2d 457 (C. A. 3); *Kristensen* v. *McGrath,* 179 F. 2d 796 (C. A. D. C.), affirmed on other grounds, 340 U. S. 162.

On the same day that S. Rep. 1515 was issued, Senator McCarran introduced S. 3455 (81st Cong., 2d Sess.), the precursor of the 1952 Act. Section 106 of S. 3455 provided that determinations of fact and exercises of discretion by administrative officers "shall not be subject to review by any court," and that determinations of law by admin-

istrative officers "shall not be subject to review by any court except through the writ of habeas corpus." This Section 106 also appeared in the successor bills, S. 716 and H. R. 2379, which were introduced in the First Session of the 82d Congress. These provisions would have restricted drastically the area of judicial intervention in deportation cases. Cf. *Bridges* v. *Wixon*, 326 U. S. 135, and *Carlson* v. *Landon*, 342 U. S. 524.

During the joint hearings before the Subcommittees on the Judiciary on S. 716 and H. R. 2379, in March and April 1951, this novel and restrictive effect of Section 106 was called to the attention of the subcommittees, particularly by the representatives of the American Civil Liberties Union and the American Bar Association, who pointed out that it would cut off the review of findings of fact which otherwise would be available in habeas corpus for both exclusion and deportation cases. Hearings, pp. 136–138, 526–530.

Apparently as a result of such objections, when the successor bills, S. 2550 and H. R. 5678, were introduced in the Second Session of the 82d Congress, Section 106 was omitted. The only explanation of the omission is contained in the report of the Senate Committee on the Judiciary (S. Rep. 1137, 82d Cong., 2d Sess.), accompanying S. 2550, which states (p. 28) that:

> In both S. 3455 and S. 716, the predecessor bills, it was provided that administrative determinations of fact and the

> exercise of administrative discretion should not be subject to judicial review and that the determinations of law should be subject to judicial review only through the writ of habeas corpus. This language is omitted from the instant bill. *The omission of the language is not intended* to grant any review of determinations made by consular officers, nor *to expand judicial review in immigration cases beyond that under existing law.* [Emphasis added.]

The quoted language, read in the light of the objections raised at the hearings, makes it clear that the deletion of Section 106 represented abandonment of the idea of *restricting* the area of review which had theretofore prevailed in habeas corpus proceedings in deportation cases, so as to leave the review of deportation cases in the same position as prevailed *"under existing law."* It is likewise clear that the Committee, in using the phrase "existing law" in S. Rep. 1137, was necessarily referring to the law as understood and expressed in its prior report (S. Rep. 1515, 81st Cong.)—that the scope of judicial review in deportation cases was limited to a habeas corpus remedy for an alien in custody. This is particularly true, because S. Rep. 1137, in interpreting the provision of S. 2550 relating to deportation proceedings, which was to be declaratory of the existing laws, states (p. 30):

> The bill declares that the prescribed deportation proceedings shall be the sole and

> exclusive procedure for determining the deportability of any alien, notwithstanding the provisions of any other law. In any case in which an order of deportation is entered under the provisions of the bill, or any other law or treaty, the decision of the Attorney General is final.[3]

Clearly, this statement of the Committee is not a summary of the rulings in *United States ex rel. Trinler* v. *Carusi,* 166 F. 2d 457 (C. A. 3), or *Kristensen* v. *McGrath,* 179 F. 2d 796 (C. A. D. C.), where it had been held that deportation orders were subject to review under the Declaratory Judgment and Administrative Procedure Acts. On the contrary, it is essentially a paraphrase of the Committee's 1950 statement (S. Rep. 1515) of the law on this subject. It, therefore, completely refutes the speculation of the Court of Appeals in *Rubinstein* v. *Brownell,* 206 F. 2d 449, 454, fn. 16 (C. A. D. C.), that the phrase "existing law" as used in S. Rep. 1137, which was issued on January 29, 1952, "at that date included the Administrative Procedure Act as it had been interpreted in 1948, 1949, and 1950 by the *Trinler, Kristensen* and *Prince*[4] decisions."

Thus, as S. 2550 and H. R. 5678 came to the floors of the Senate and the House, both provided

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[3] H. Rep. 1365, 82d Cong., 2d Sess., pp. 27, 58, which was predicated upon basic findings made in S. Rep. 1515, contained the same statement.

[4] *Prince* v. *Commissioner,* 185 F. 2d 578 (C. A. 6).

in Section 242 (b) that in deportation cases the Attorney General's decision should be final and the history of the bills and the committee reports show that this finality excluded all judicial review except the constitutionally required safeguard of habeas corpus.

2. *The House debate.* The first debate took place in the House on H. R. 5678. There, Representative Meader introduced an amendment which would have deleted the provision of Section 242 (b) that the Attorney General's decision in deportation cases shall be "final" and would have provided instead that "the order of deportation shall be subject to review by any court of competent jurisdiction." (98 Cong. Rec. 4415, 4414.)[5] After a remark by Representative Walter (*id.* 4414), who was in charge of the bill, that the bill reinstated the decision of *Wong Yang Sung* v. *McGrath,* 339 U. S. 33 (which actually dealt with hearing procedures), Congressman Meader, arguing in support of the amendment, said (*id.* 4415):

[5] Two other amendments, proposed by Representative Meader, would have eliminated the provision of Sections 242 (a) and (c) which require a "conclusive showing" of delay by the Attorney General as a basis for relief in a habeas corpus proceeding to test detention of an alien pending completion of deportation proceedings or the execution of a deportation order. Representative Meader's amendments would have given the courts general jurisdiction to review the action of the Attorney General in detaining an alien without specifying that the proceeding be in the nature of habeas corpus or the grounds necessary for relief.

"I say we ought to say plainly and unequivocally that administrative decisions are subject to judicial review. This amendment will make clear that judicial review is available. We should not leave it up to a tenuous interpretation of some Supreme Court decision." He also stated: "the most serious part, it seems to me, is the provision that the Attorney General's decision shall be final. I think it is about time we restored the right of individuals to have their cases heard in a court. * * * If that language does not deny access to the courts, then it seems to me it does not belong in this act" (*id.* 4415). Representative Walter, in opposing the amendment, replied (*id.* 4415–4416):

> * * * The gentleman seems to be concerned lest the right to a writ of habeas corpus be affected. I refer the gentleman to the Constitution of the United States, and I am sure if he looks at it again he will find that he need have no fear on that score, because a writ cannot be denied.
>
> Now, we come to this question of the finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the Government is concerned, but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedures Act is applicable. From that decision an appeal lies in the courts. If there is not a final administrative decision, then these aliens will go

> from one administrative body to another, seeking relief, because they do not want a final adjudication.
>
> * * * In view of the fact that every person who is ordered deported has all of these administrative processes available, plus an appeal to the court, plus the right to a writ of habeas corpus, I cannot conceive of a case where any injustice would be done by some capricious or arbitrary administrator.
>
> I would like to remind the gentleman of one thing, that Senator McCarran, who sat in these hearings, and in the preparation of this bill, and I, were both commended by the American Bar Association because of the work we did in providing for judicial review from a decision of an administrative agency. We have been very zealous to see that the philosophy underlying that act is embodied in this measure. I am sure that if the gentleman will look at page 163, paragraph 46, he will find that the law as it was before the House adopted this amendment to an appropriation bill, has been reinstated and that the decision of the Supreme Court in the Sung case will be the law of the land when this code is adopted.

The Meader amendment was defeated (*id.* 4416, 4415).

Representative Walter's statement, which is the only outright assertion in the Congressional debates that Section 10 of the Administrative Procedure Act applies in deportation cases, was

heavily relied upon by the Court of Appeals in *Rubinstein* v. *Brownell*, 206 F. 2d 449, (454–455) (C. A. D. C.). However, this unprepared statement, made in course of debate, can hardly have such controlling weight when considered in relation to the whole legislative history of the Act. The actual question before the House, at the time the statement was made, related to the fears of Representative Meader that the scope of review in habeas corpus was being curtailed. Representative Walter was assuring the House that the Constitution guaranteed minimum judicial review in habeas corpus. He went further and said that there was additional review, but then he also talked about the decision of this Court in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, which related, not to judicial review, but to the conduct of administrative hearings. The whole tone of the statement was to assure the House that in the new Act there was ample protection from arbitrary and capricious administrative action. But not all the statements made in the course of this one, unprepared speech are entirely accurate and they cannot be relied upon as an authoritative interpretation of the statute.

3. *The Senate debate.* In the course of the Senate debates on S. 2550, it was generally understood that the bill did not provide for judicial review of deportation orders beyond habeas corpus proceedings (see, for example, 98 Cong. Rec. 5113, 5154–5155, 5165, 5180, 5212, 5213, 5315, 5316,

5418, 5420–5421, 5434, 5604, 5778, 5781). In the Senate, as in the House, discussion of the judicial review of deportation orders centered around proposed amendments which would have accomplished the result of the decision below. The Senate rejected three amendments which were probably intended to make review under the Administrative Procedure Act, in addition to habeas corpus, available for judicial scrutiny of exclusion and deportation orders. The first amendment, which was in the nature of a substitute offered by Senator Lehman for himself and others, provided, *inter alia,* for the establishment of the Board of Immigration Appeals as an independent agency within the Department of Justice. Section 8 of the Lehman substitute provided that, "The provisions of the Administrative Procedure Act shall be applicable to all proceedings relating to the exclusion or expulsion of aliens" (98 Cong. Rec. 5427–5428).

Senator Moody proposed a new Section 105 (a), under which the Board of Immigration Appeals would have been vested with authority to review "any decision of the Attorney General * * * in proceedings relating to exclusion [or] deportation * * *." The Moody amendment concluded with the sentence "Except in the case of proceedings under section 235 (c) [relating to security cases], the provisions of the Administrative Procedure Act shall apply to all proceedings of the Board" (98 Cong. Rec. 5778).

Senator Morse offered an amendment to Section 242 (b) designed (1) to make the hearing provisions of the Administrative Procedure Act applicable to deportation and exclusion proceedings, and (2) to provide specifically that "Notwithstanding any provisions to the contrary, * * * every person aggrieved by an adverse order in exclusion or deportation proceedings may obtain court review in an action for declaratory judgment pursuant to title 28, United States Code, section 2201, or upon a writ of habeas corpus" (98 Cong. Rec. 5781).

Senator McCarran opposed the Morse amendment, particularly on the ground that it would grant a right of judicial review with respect to *exclusion* orders, a right which, he asserted, had never previously been recognized under international law (98 Cong. Rec. 5789). He opposed the Moody amendment on the grounds (1), that it would create an administrative body, within the Justice Department, which could set aside decisions of the Attorney General, the highest officer of the Department, and (2) that it would be unwise t establish the Board of Immigration Appeals as a statutory body, in view of the provisions of S. 14, previously introduced by the Senator, to create an administrative court to review all administrative determinations (98 Cong. Rec. 5778). In connection with the Moody amendment, Senator McCarran stated (98 Cong. Rec. 5778): "The Administrative Procedure Act is

made applicable to the bill. The Administrative Procedure Act prevails now. The Senator need not worry about its not being in the law, because the Administrative Procedure Act covers the very point which the Senator is attempting to reach." Senator McCarran's statement, read in context, probably related to the *administrative procedures* provisions of the Moody amendment.[6] Senator McCarran similarly objected to the "sweeping provision [in the Lehman substitute] that the provisions of the Administrative Procedure Act shall be applicable to all proceedings relating to the exclusion or expulsion of aliens." Among other reasons, he opposed the Lehman substitute because of the pendency of S. 14, stating in this connection that "the question of the review of decisions of the Immigration and Naturalization Service had better not be the subject of impulsive tampering at this time" (98 Cong. Rec. 5625). The Lehman, Moody, and Morse amendments were defeated (98 Cong. Rec. 5630).

It is clear that Senator McCarran was unwilling to permit review other than in habeas corpus proceedings with respect to exclusion orders, and he and Senator Ferguson, another member of the committee from which the bill was reported, also

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[6] In fact, on the next page of the Congresional Record (98 Cong. Rec. 5779) Senator McCarran stated: "* * * The bill provides for administrative procedures and makes the Administrative Procedure Act applicable *insofar as the administration of the bill is concerned.* [Emphasis added.]"

indicated that habeas corpus was the proper remedy for the review of both exclusion *and deportation* orders, in the following colloquy (98 Cong. Rec. 5779):

> Mr. FERGUSON. I wish to inquire whether it would be possible to obtain an appeal[7] through a writ of habeas corpus, in connection with which the application of the rule of substantial evidence would be determined.
>
> Mr. MCCARRAN. That is correct, and it is done right along.

4. *The Conference Reports.* The general terms of the Conference Report, H. Rep. 2096, 82d Cong., 2d Sess., throw no light on the subject of judicial review. The report briefly states at p. 127:

> Having extensively considered the problem of judicial review, the conferees are satisfied that procedures provided in the bill, adapted to the necessities of national security and the protection of economic and social welfare of the citizens of this country, remain within the framework and the pattern of the Administrative Procedure Act. The safeguard of judicial procedure is afforded the alien in both exclusion and deportation proceedings.

This statement must be read against the background, noted *supra*, pp. 16–19, that the several

[7] The use of the term "appeal" in this context is another indication of the loose employment in the Congressional debates of terminology with respect to judicial review.

ancestor bills, introduced as late as the first session of the same Congress, all contained a provision which would have drastically curtailed the scope of habeas corpus review. The first sentence recites only that consideration has been given to problems of judicial review under the bill—problems of whether and what review should be provided for consular decisions on visa applications and for claims of citizenship—as well as for exclusion and deportation decisions. The second sentence can mean no more than that the special administrative procedures provided in Sections 236 and 242 for exclusion and deportation cases were designed to afford aliens the protection of precisely defined procedures and procedural rights. Certainly, the phrase "judicial procedure" in the second sentence could not refer to direct judicial review, because it also had reference to exclusion proceedings, which all agreed were not intended to be subject to review, save in habeas corpus.[8]

[8] That such general terms throw no light on specific problems of judicial review is also demonstrated in the report of the House Committee on the Judiciary (H. Rep. 1365, 82d Cong., 2d Sess., p. 28), which simply states that the bill "Safeguards judicial review and provides for fair administrative practice and procedure (secs. 235, 242, and 360)." Again, the reference to the safeguarding of judicial review must be considered against the background of the earlier bills limiting extremely the scope of habeas corpus in deportation matters. The provisions in the enumerated sections for judicial action relate to judicial enforcement of administrative subpoenas (Section 235), a limited review of detention decisions in habeas corpus proceedings (Section 242), and judicial determination of certain claims of American citizen-

C. A reading of the Act as a whole does not support the conclusion that Congress intended to provide additional forms of court review

The Court of Appeals in *Rubinstein* v. *Brownell*, 206 F. 2d 449, 452–453 (C. A. D. C.), placed great reliance upon the provision of Section 242 (c) that "the Attorney General shall have a period of six months from the date of such [deportation] order, *or, if judicial review is had, then from the date of the final order of the court,* within which to effect the alien's departure from the United States * * *."[9] [Emphasis added by the court.] Referring to this Court's distinction in *Heikkila* v. *Barber*, 345 U. S. 229, 236, between habeas corpus and "judicial review as that term is used in the Administrative Procedure Act," the Court of Appeals in the *Rubinstein* case stated that " 'Judicial review' is not synonymous with habeas corpus," and concluded that by the reference to "judicial review" in Section 242 (c) Congress intended to make deportation orders reviewable otherwise than in habeas corpus (206 F. 2d at 452). To the contrary, we believe that it is clear on the face of Section 242 (c) that the incidental reference to "judicial review" merely

ship (Section 360). Thus, it is clear that general references to judicial review under the Act may relate to any one of several different matters, and, absent a specific context, are of no assistance in the interpretation of a particular provision of the Act.

[9] A similar reference to "judicial review" appears in Section 242 (e).

reflects the understanding of Congress that the actual deportation of an alien is frequently deferred pending judicial review of deportation orders *in habeas corpus proceedings,* and was made solely for the purpose of insuring that the authorized detention period shall not end until six months after the Attorney General becomes free to effect the alien's removal.

There is no basis for the assumption in the *Rubinstein* decision that in thus alluding to "judicial review" Congress was drawing a precise technical distinction between the scrutiny permissible in habeas corpus and direct "judicial review." The phrases, "judicial review" and "habeas corpus," although technically not synonymous in that the latter does not embrace the full scope of review connoted by the former, are not incongruous and ordinarily they may be used interchangeably. The phrase "judicial review" in subdivisions (c) and (e) of Section 242 of the Act was not used independently to define or describe the scope of the review mentioned therein, but rather it was used relatively, that is to refer to a procedure which would affect the time schedule for execution of deportation. Thus, it was not necessarily used in the technical sense of direct judicial review, in which sense, as this Court observed in the *Heikkila* case, *supra,* at 236, it is differentiated from habeas corpus review.

Nor is there any basis for the supporting assumption in the *Rubinstein* case, *supra,* at 453,

that Congress was aware of, accepted, and wrote into the Act the result of the *Trinler* (166 F. 2d 457), *Prince* (185 F. 2d 578) and *Kristensen* (179 F. 2d 796) decisions of the Third, Sixth and District of Columbia Circuits holding that review under the Administrative Procedure Act was available. That this assumption, as well as its presumption that Congress intended to employ the phrase "judicial review" in Section 242 in its technical sense of direct review, is unwarranted, is evidenced as we have shown above by the expressed basic views of the Senate Judiciary Committee (*supra*, pp. 15–16), in S. Rep. 1515, *The Immigration and Naturalization Systems of the United States* (p. 629) that:

> * * * In a habeas corpus proceeding, based on a deportation case, the court determines whether or not there has been a fair hearing, whether or not the law has been interpreted correctly, and whether or not there is substantial evidence to support the order of deportation. *Habeas corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service.* * * * [Emphasis added.]

In view of this precise understanding of the Senate Committee that habeas corpus was the sole method by which deportation orders can be challenged in the courts, plus the express refusal of Congress to provide additional methods of review, it cannot be contended that the incidental

allusions to "judicial review" in Section 242 (c) and (e) refer to anything other than review in habeas corpus proceedings.

The quoted language of the basic report, S. Rep. 1515, likewise reveals, contrary to the assumption of the Court of Appeals in the *Rubinstein* case (206 F. 2d at 452), that Congress in enacting the provision of Section 242 (b) (4), requiring the Attorney General to issue administrative regulations prescribing that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence,"[10] did not contemplate any changes in the type or in the timing of review of deportation orders. In addition, the fact that Congress directed the Attorney General to prescribe the standard for decision in his regulations clearly indicates a direction to him as to how the Act should be administered, rather than the establishment of a new rule for court review.

The only fair conclusion that can be drawn from Section 242 as a whole is that the sole method of review contemplated by that section is in habeas

[10] Concerning this requirement the House Committee stated that it "means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that below," H. Rep. No. 1365, 82d Cong., 2d Sess., p. 57. However, the words "appellate body" do not necessarily refer to direct review; they are equally apt with reference to administrative review or habeas corpus.

corpus proceedings. In subdivision (a) provision is made for detention or release of the alien "pending a determination of deportability." Subdivision (b) provides for the administrative procedure to be followed in determining deportability. And then subdivision (c) provides that:

> When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may be detained, released on bond [etc.].

The Court of Appeals, in the *Rubinstein* case, while recognizing that in Section 242 (a) and (c) Congress intended to provide authority for the continuous detention of an alien from the commencement of deportation proceedings and until the close of the six-month period which the Attorney General has to effect deportation, saw a possible gap in this authority. It found this gap in the period in which an alien is challenging the order for his deportation in the courts, on the theory that "if judicial review is had" paragraph (c) authorizes detention of the alien only during the period of six months following the completion of the judicial proceedings. The court closed this asserted gap by reading the detention provision of paragraph (a), not-

withstanding its express limitation to "pending a determination of deportability", as applying during the period of "judicial review" (206 F. 2d at 455). However, it should be noted that there is no "gap" if the reference to "judicial review" in paragraph (c) is read to mean review in habeas corpus. Since the alien may commence habeas corpus proceedings only after he has been taken into custody under a final order of deportation, there was no need to provide in Section 242 (c) an express grant of authority to take the alien into custody during the pendency of the judicial proceedings. The mere fact that such an apparent break in the authority to detain is created by the decision below strongly suggests that the Act contemplates that deportation orders will be challenged only in habeas corpus proceedings, in which event no such gap exists.

Finally, the court in *Rubinstein* sought textual support for its conclusions in the provision of Section 360 (c) of the 1952 Act (8 U. S. C. 1503) that "A final determination by the Attorney General that any *such* person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise." [Emphasis added.] The Court of Appeals concluded from this language that Congress had expressly limited persons seeking admission to the United States to review in habeas corpus, and that its failure to impose

such a restriction in deportation cases reflected a purpose to make deportation orders reviewable in proceedings other than habeas corpus (206 F. 2d at 453). But, the provision cited had an entirely different purpose and history. In enacting Section 360, Congress was creating a change in the existing law. Under Section 503 of the Nationality Act of 1940, 54 Stat. 1171, persons claiming to be citizens or nationals of the United States, regardless of whether such persons were within or outside the United States, were given a special declaratory judgment procedure to obtain a judicial determination of their claims. The purpose of Section 360 of the 1952 Act is to make that prior judicial procedure unavailable to persons outside the United States and to provide for the determination of the claims of persons asserting citizenship by the Attorney General in administrative exclusion proceedings.[11] In providing that such determinations of the Attorney General "shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise," Section 360 (c) is obviously intended to emphasize and make clear the withdrawal of the right to an independent judicial determination. It has nothing to do with ordinary exclusion cases as to which Section 236 (c) (8 U. S. C. 1226 (c)) merely provides, like the

[11] The remedy is restricted to persons who have previously been in the United States or persons under 16 born abroad of parents who were citizens. It has no application whatever to persons admittedly alien seeking admission.

former exclusion statute which was before this Court in *Tom We Shung* v. *Brownell*, 346 U. S. 906, that the administrative decision shall be "final." In brief, the Court of Appeals drew an entirely erroneous conclusion from Section 360 (c).

The legislative history of the statute, as discussed above, pp. 14–28, contains positive indication of Congressional purpose to retain unreviewability, save for the constitutional minimum. The unsuccessful efforts of opponents of the bill, in both the House and the Senate, to amend the bill so as to provide for unlimited review of deportation orders is rather clear proof that the bill as enacted was not intended to provide for unlimited review. However, even if there were no affirmative indication of Congressional intent against unlimited reviewability, the inherently political nature of the subject matter of deportation is a special reason for exercising caution on questions of unlimited reviewability. Generally, in interpreting statutes, what is implicit therein is as much a part of the statute as what is explicit. Cf. *Switchmen's Union of North America* v. *National Mediation Board*, 320 U. S. 297.

D. Congress would not have expanded an historically established form of review of deportation orders without making some arrangement for procedural requirements incidental to such expansion

If Congress had intended to make a novel departure from the historical method of review of deportation orders, Section 242 (b) of the Immigration and Nationality Act of 1952 is strangely

silent concerning the procedural problems inevitably created by such departure. If the Act, as the court below held, permits declaratory and injunctive relief under Section 10 of the Administrative Procedure Act, then it makes no provision for such important aspects as venue, expedition in determination of petitions for review, and the prevention of repetitious judicial proceedings. Specifically, there is no provision authorizing the filing of a petition for judicial review of a final deportation order under Section 10 of the Administrative Procedure Act in the federal district court within which the administrative deportation proceedings were conducted. As we contend in Point II, *infra*, the Commissioner of Immigration and Naturalization would be an indispensable party to any action to review deportation orders under Section 10. Thus, the venue in such actions would in the absence of legislation necessarily lie in the district of his official residence, Washington, D. C. Besides the hardship and inconvenience that such venue would occasion for the alien, it will have the undesirable result of centralizing that type of litigation in the already overworked courts of the District of Columbia. In sharp contrast, the historical practice of restricting review of deportation orders to habeas corpus proceedings has the advantage of invoking well-established rules as to the venue of such proceedings and as to the official who should be named as respondent. Habeas corpus must be brought in the judicial district in which

the alien is held in actual or nominal custody, *Ahrens* v. *Clark*, 335 U. S. 188, and it must be directed to the officer who detains him. 28 U. S. C. 2243.

Furthermore, since there is no provision for the expeditious determination of petitions for judicial review in the same manner as in habeas corpus proceedings, the congested court calendars would necessarily retard review. It is significant that out of 44 complaints seeking review of deportation orders filed in the District Court for the District of Columbia alone, between the time of the decision of this Court in the *Rubinstein* case on January 11, 1954, and November 26, 1954, only four have been reduced to judgment.

Finally, the subjection of deportation orders to direct judicial review will in the absence of statutory protection result in a multiplicity of judicial proceedings with respect to a single issue. An alien might, after an adverse ruling on his petition for review of his deportation order, still obtain further delay through a series of habeas corpus proceedings.

The foregoing procedural problems, which must be solved by the courts if it is judicially determined that deportation orders are subject to direct review under Section 10 of the Administrative Procedure Act, are matters more appropriately provided for by legislation. It should be left to the legislature, not only to provide for the type and the scope of judicial review of deportation orders as soon as

they are administratively final, but at the same time to prescribe orderly venue arrangement, and to provide means for minimizing the possible abuses of repetitious reviews. As Justice Frankfurter stated in his dissenting opinion in *Stark* v. *Wickard*, 321 U. S. 288, 312: "Apart from the text and texture of a particular law in relation to which judicial review is sought, 'judicial review' is a mischievous abstraction. There is no such thing as a common law of judicial review in the federal courts." [12]

Recognizing the deficiency of the habeas corpus remedy from the standpoint of the alien, the Attorney General, on March 10, 1954, in identical letters to the Speaker of the House of Representatives and the Vice-President urged the enactment of legislation to permit direct judicial review of deportation orders. (Press Release, Department of Justice, dated March 10, 1954.) Together with the letters, he submitted a draft of a proposed bill [13] designed to settle the problems discussed above. Until Congress acts, no matter how desirable as a matter of policy and principle a change in the historical review of deportation orders is, such a change should not be effected by the judiciary.

In the final analysis, if it is determined that aliens should continue to be limited to a review of deportation orders in habeas corpus proceedings, they will continue to enjoy substantial rights

[12] Compare Justice Frankfurter's proposal in his dissenting opinion in *Heikkila* v. *Barber*, 345 U. S. 229, 240–241.

[13] A copy of the pertinent portions of the letter and of the proposed bill appears in Appendix B, *infra*, pp. 56–60.

of review. As the Attorney General, in referring to *Heikkila* v. *Barber*, 345 U. S. 229, has recently stated: "Regarding the scope of review, it is doubtful whether the scope is now any different in habeas corpus from that which is accorded to the orders of other agencies under section 10 of the Administrative Procedure Act." *Report of the Judicial Conference of the United States* (September, 1953) p. 43.

II. The Commissioner of Immigration is an indispensable party to an action for declaratory relief

If this Court holds, as we urge, that deportation orders may be challenged only in habeas corpus proceedings, the venue of such proceedings will be governed by the habeas corpus statute (28 U. S. C. 2241, *et seq.*). However, if it is held that deportation orders may be reviewed in an action for an injunction or a declaratory judgment under Section 10 of the Administrative Procedure Act, there arises the question whether such actions may be brought against the District Director of the Immigration and Naturalization Service in the judicial district in which he is stationed, or whether they must be brought against his superior officer, the Commissioner of Immigration.

Essentially, the relief sought by respondent in the trial court was a review on the merits of the administrative proceedings resulting in the final deportation order against him. Ancillary to such relief, respondent also asked for a temporary in-

junction, staying the execution of the deportation order pending a decision on the merits (R. 1–3). Assuming, *arguendo*, that a deportation order may be reviewed apart from habeas corpus proceedings, we submit that the Commissioner of Immigration is an indispensable party to such action, and that therefore the court below erred in holding that the suit could be maintained against the District Director of Immigration alone. In this position we are directly supported by decisions of the Courts of Appeals in the Third and Ninth Circuits. *Paolo* v. *Garfinkel*, 200 F. 2d 280 (C. A. 3); *Rodriguez* v. *Landon*, 212 F. 2d 508 (C. A. 9).

The administrative deportation hearings in the instant case resulted in the hearing officer's recommendation of deportation.[14] However, this decision was not final since the alien filed exceptions with the district director so that the hearing officer's findings and the record were forwarded to the Assistant Commissioner, Adjudication Division, in Washington.[15] On May 5, 1952, the latter adopted

[14] 8 C. F. R. (1951 Cum. Supp.) § 151.5 (a) provided that: "the hearing officer shall, as soon as practicable after the conclusion of the hearing, prepare in writing a decision, signed by him, which shall set forth a summary of the evidence adduced and his findings of fact and conclusions of law as to the deportability * * *. The decision shall be concluded with a statement of the hearing officer's disposition of the case which shall be (1) that the alien be deported [etc.]."

[15] The applicable regulation of the Immigration and Naturalization Service provided (8 C. F. R. (1951 Cum. Supp.) 151.5 (c) and (e)):

the hearing officer's decision (R. 2). The order of deportation became final on June 24, 1953, after the Board of Immigration Appeals dismissed respondent's appeal, in accordance with the provisions of 8 C. F. R. (1949 ed.) § 90.3 (*e*).[18]

"(e) *Exceptions to written decision.* The alien or his counsel or representative shall be allowed five business days (which period may be extended by the hearing officer upon a showing of good cause that more time is necessary) in which to submit to the officer in charge of the district or suboffice, for consideration by the Commissioner, exceptions to the hearing officer's decision, which may be accompanied by supporting argument or brief. * * *

* * * * *

"(e) *Finality of decision.* The hearing officer's decision described in paragraphs (a) and (d) of this section shall be final except:

* * * * *

"(4) When the alien or his counsel or representative files exceptions to the hearing officer's decision in conformity with paragraph (e) or (d) of this section.

"Every case within subparagraphs (1) to (4), inclusive, shall be referred promptly to the Commissioner and the hearing officer's decision shall be final only upon approval by the Commissioner, subject, however, to appeal to the Board of Immigration Appeals as provided in § 90.3 of this chapter. In considering such cases, the Commissioner may enter any order which he deems appropriate for the disposition of the case. * * *."

[18] In December 1952, the regulations were revised to conform to the requirements of the Immigration and Nationality Act of 1952. The new regulations contain substantially the same provisions with respect to deportation hearings conducted by a "special inquiry officer," whose order for the deportation of an alien shall be final upon affirmance on direct appeal to the Board of Immigration Appeals in the Office of the Attorney General. 8 C. F. R. (1952 ed.) §§ 242.61, 6.1. The requirement for an intermediate review by the Commissioner has been eliminated.

Thus, upon respondent's filing of exceptions, the proceedings were taken out of the district director's jurisdiction and transferred to the jurisdiction of the central office in Washington. The issuance of a warrant for deportation depended on the Commissioner's adoption of the hearing officer's decision and, since respondent appealed, its affirmance by the Board of Immigration Appeals. Upon such affirmance, the deportation order became enforceable against the person of respondent in whatever district he could be found. It then became incumbent upon the appropriate district director to issue a warrant of deportation and carry out the mandate of the order.[17]

Respondent is not challenging the authority of the district director to issue a warrant of arrest pursuant to the deportation order; the relief respondent has requested against the district director is only ancillary to the principal relief requested. The principal relief sought by him in the trial court is a judicial determination on the merits that the final order for his deportation is unlawful in that it is not supported by legal evidence. Inherently, the action involves a challenge of the manner in which the Commissioner has exercised his authority. And, since only ancillary relief is sought against the district director in whose jurisdiction respondent finds himself, the action in-

[17] 8 C. F. R. (1952 ed.) § 243.1 (a) provides:

"In any case in which an order of deportation becomes final a warrant of deportation shall be issued. District directors shall issue warrants of deportation."

volved herein necessarily raises a controversy as to the validity of the deportation order, not only as a specific authority for the anticipated action of the particular district director, but also as a general authority for the possible action by any other district director.

The instant case, therefore, is not one where the indispensability of the superior officer as a party is to be determined by the application of the test as to whether the decree will culminate in the desired relief "by expending itself on the subordinate official who is before the court." *Williams* v. *Fanning,* 332 U. S. 490, 494. It is rather to be treated as one where the predominant interest of the superior officer in the subject matter of the action, inasmuch as his public duties will be affected by a decision therein, determines his indispensability as a party in accordance with traditional principles of practice. Cf. *Commonwealth Trust Co.* v. *Smith,* 266 U. S. 152; *Minnesota* v. *Northern Securities Co.,* 184 U. S. 199; *Brown* v. *Christman,* 126 F. 2d 625 (C. A. D. C.); Rule 19 (a), F. R. Civ. Proc.; see also *Paolo* v. *Garfunkel,* 200 F. 2d 280 (C. A. 3), cited with apparent approval in *Heikkila* v. *Barber,* 345 U. S. 229; *Slavik* v. *Miller,* 184 F. 2d 575 (C. A. 3), certiorari denied, 340 U. S. 955; *Connor* v. *Miller,* 178 F. 2d 755 (C. A. 2).

Respondent's action, therefore, should, on equitable principles, lie against the ultimate promulgator of the order, the Commissioner of Immigration and Naturalization or his Assistant, who would

then be afforded an opportunity to defend his action. See *Plested* v. *Abbey*, 228 U. S. 42, 50–51, and *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 578, cited in *Guerich* v. *Rutter*, 265 U. S. 388, 392.

In any event, even if a decree granting the relief requested in the instant case could be considered as sufficient to prevent the district director of New York from issuing a deportation warrant against respondent, the Commissioner would still be considered an indispensable party under the rationale of such cases as *Blackmar* v. *Guerre*, 342 U. S. 512; *Hynes* v. *Grimes Packing Co.*, 337 U. S. 86, 96; *Williams* v. *Fanning*, 332 U. S. 490; *Colorado* v. *Toll*, 268 U. S. 228; and *Guerich* v. *Rutter*, 265 U. S. 388. The deportation order is not addressed to any particular district director. Thus, the deportation may be carried out not only in the Southern District of New York, where respondent brought the action, but in any part of the United States in which he may be found.

In strict logic, any decree issued by the trial court herein would be binding only upon the district director named as the defendant and within the jurisdiction of that court, and it would in no way preclude directors in other districts from deporting respondent, if he should be found in any of their districts. Thus, unlike the situations in the *Hynes* and *Williams* cases, *supra*, where the decrees gave the full relief requested, a decree by the trial court in the instant case could not "effectively grant the relief desired", for it would not expend "itself on

the subordinate official who is before the court" (332 U. S. at 494). See *Paolo* v. *Garfinkle,* 200 F. 2d 280 (C. A. 3); *Corona* v. *Landon,* 111 F. Supp. 191 (S. D. Calif.). Such relief can be accomplished only by the rescission or abandonment of the deportation order by the Commissioner who is not before the court. We do not read the decisions of this Court as holding that this can be compelled by a suit against a subordinate officer.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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FEBRUARY 1955.

APPENDIX A

STATUTES INVOLVED

Section 242, Immigration and Nationality Act of 1952 (66 Stat. 208, 8 U. S. C. 1252) provides in pertinent part:

APPREHENSION AND DEPORTATION OF ALIENS

(a) Pending a determination of deportability in the case of any alien as provided in subsection (b) of this section, such alien may, upon warrant of the Attorney General, be arrested and taken into custody. Any such alien taken into custody may, in the discretion of the Attorney General and pending such final determination of deportability, (1) be continued in custody; or (2) be released under bond in the amount of not less than $500 with security approved by the Attorney General, containing such conditions as the Attorney General may prescribe; or (3) be released on conditional parole. But such bond or parole, whether heretofore or hereafter authorized, may be revoked at any time by the Attorney General, in his discretion, and the alien may be returned to custody under the warrant which initiated the proceedings against him and detained until final determination of his deportability. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or parole pending final decision of deportability upon a conclusive showing in habeas corpus proceedings that the Attorney General is not

proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to determine deportability.

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien. If any alien has been given a reasonable opportunity to be present at a proceeding under this section, and without reasonable cause fails or refuses to attend or remain in attendance at such proceeding, the special inquiry officer may proceed to a determination in like manner as if the alien were present. In any case or class of cases in which the Attorney General believes that such procedure would be of aid in making a determination, he may require specifically or by regulation that an additional immigration officer shall be assigned to present the evidence on behalf of the United States and in such case such additional immigration officer shall have authority to present

evidence, and to interrogate, examine and cross-examine the alien or other witnesses in the proceedings. Nothing in the preceding sentence shall be construed to diminish the authority conferred upon the special inquiry officer conducting such proceedings. No special inquiry officer shall conduct a proceeding in any case under this section in which he shall have participated in investigative functions or in which he shall have participated (except as provided in this subsection) in prosecuting functions. Proceedings before a special inquiry officer acting under the provisions of this section shall be in accordance with such regulations, not inconsistent with this Act, as the Attorney General shall prescribe. Such regulations shall include requirements that—

(1) the alien shall be given notice, reasonable under all the circumstances, of the nature of the charges against him and of the time and place at which the proceedings will be held;

(2) the alien shall have the privilege of being represented (at no expense to the Government) by such counsel, authorized to practice in such proceedings, as he shall choose;

(3) the alien shall have a reasonable opportunity to examine the evidence against him, to present evidence in his own behalf, and to cross-examine witnesses presented by the Government; and

(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

The procedure so prescribed shall be the sole and exclusive procedure for determining the deportability of an alien under this section. In any case in which an alien is ordered deported from the United States

under the provisions of this Act, or of any other law or treaty, the decision of the Attorney General shall be final. In the discretion of the Attorney General, and under such regulations as he may prescribe, deportation proceedings, including issuance of a warrant of arrest, and a finding of deportability under this section need not be required in the case of any alien who admits to belonging to a class of aliens who are deportable under section 241 if such alien voluntarily departs from the United States at his own expense, or is removed at Government expense as hereinafter authorized, unless the Attorney General has reason to believe that such alien is deportable under paragraph (4), (5), (6), (7), (11), (12), (14), (15), (16), (17), or (18) of section 241 (a). If any alien who is authorized to depart voluntarily under the preceding sentence is financially unable to depart at his own expense and the Attorney General deems his removal to be in the best interest of the United States, the expense of such removal may be paid from the appropriation for the enforcement of this Act.

(c) When a final order of deportation under administrative processes is made against any alien, the Attorney General shall have a period of six months from the date of such order, or, if judicial review is had, then from the date of the final order of the court, within which to effect the alien's departure from the United States, during which period, at the Attorney General's discretion, the alien may

be detained, released on bond in an amount and containing such conditions as the Attorney General may prescribe, or released on such other condition as the Attorney General may prescribe. Any court of competent jurisdiction shall have authority to review or revise any determination of the Attorney General concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period. If deportation has not been practicable, advisable, or possible, or departure of the alien from the United States under the order of deportation has not been effected, within such six-month period, the alien shall become subject to such further supervision and detention pending eventual deportation as is authorized in this section. The Attorney General is hereby authorized and directed to arrange for appropriate places of detention for those aliens whom he shall take into custody and detain under this section. Where no Federal buildings are available or buildings adapted or suitably located for the purpose are available for rental, the Attorney General is hereby authorized, notwithstanding section 3709 of the Revised Statutes, as amended (41 U. S. C. 5), or section 322 of the Act of June 30, 1932, as amended (40 U. S. C. 278a), to expend, from the appropriation provided for the administration and enforcement of the immigration laws, such amounts as may be necessary for the acquisition of land and the erection, acquisition, maintenance, opera-

tion, remodeling, or repair of buildings, sheds, and office quarters (including living quarters for officers where none are otherwise available), and adjunct facilities, necessary for the detention of aliens. For the purposes of this section an order of deportation heretofore or hereafter entered against an alien in legal detention or confinement, other than under an immigration process, shall be considered as being made as of the moment he is released from such detention or confinement, and not prior thereto.

Section 360, Immigration and Nationality Act of 1952 (66 Stat. 273, 8 U. S. C. 1503) provides in pertinent part:

PROCEEDINGS FOR DECLARATION OF UNITED STATES NATIONALITY IN THE EVENT OF DENIAL OF RIGHTS AND PRIVILEGES AS NATIONAL

* * * * *

(b) If any person who is not within the United States claims a right or privilege as a national of the United States and is denied such right or privilege by any department or independent agency, or official thereof, upon the ground that he is not a national of the United States, such person may make application to a diplomatic or consular officer of the United States in the foreign country in which he is residing for a certificate of identity for the purpose of traveling to a port of entry in the United States and applying for admission. Upon proof to the satisfaction of such diplomatic or consular officer that such application is made in good faith and has a substantial basis, he shall issue to such person a certificate of identity. From any denial of an application for such certificate

the applicant shall be entitled to an appeal to the Secretary of State, who, if he approves the denial, shall state in writing his reasons for his decision. The Secretary of State shall prescribe rules and regulations for the issuance of certificates of identity as above provided. The provisions of this subsection shall be applicable only to a person who at some time prior to his application for the certificate of identity has been physically present in the United States, or to a person under sixteen years of age who was born abroad of a United States citizen parent.

(c) A person who has been issued a certificate of identity under the provisions of subsection (b), and while in possession thereof, may apply for admission to the United States at any port of entry, and shall be subject to all the provisions of this Act relating to the conduct of proceedings involving aliens seeking admission to the United States. A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction in habeas corpus proceedings and not otherwise. Any person described in this section who is finally excluded from admission to the United States shall be subject to all the provisions of this Act relating to aliens seeking admission to the United States.

Section 10, Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009) provides in pertinent part:

JUDICIAL REVIEW

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion—

(A) RIGHT OF REVIEW

Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(B) FORM AND VENUE OF ACTION

The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(C) REVIEWABLE ACTS

Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. * * *

* * * * *

(E) SCOPE OF REVIEW

So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and deter-

mine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

APPENDIX B

PERTINENT PORTIONS OF IDENTICAL LETTERS FROM THE ATTORNEY GENERAL DATED MARCH 10, 1954, TO THE SPEAKER OF THE HOUSE OF REPRESENTATIVES AND THE VICE PRESIDENT

* * * * *

"Historically, the immigration laws of the United States have never provided for judicial review of orders for the deportation of aliens from the United States. However, the courts have permitted such orders to be challenged in habeas corpus proceedings which are available to aliens after they have been taken into custody pursuant to such orders of deportation. In recent years, it has been suggested by judges and lawyers and by officials of this Department that an alien should be able to obtain judicial review of an order for his deportation as soon as it has been issued and without waiting until he has been taken into custody. I concur in this view and believe that the attached legislative proposal will effectively accomplish this desirable change in the law.

"Moreover, there is a present need for clarification on this subject. In 1953, the Court of Appeals for the District of Columbia, in *Rubinstein* v. *Brownell,* 206 F. 2d 449, held that deportation orders issued under the Immigration and Nationality Act of 1952 are reviewable in actions for declaratory judgments as well as in habeas corpus. This decision was affirmed by an equally divided Supreme Court on January 11, 1954, thus leaving the

question in doubt. The Declaratory Judgment Act contains no provisions for expediting the determination of cases involving deportation orders, or for reasonably distributing such cases among the Federal courts. Thus, only specific legislation can provide in this area a judicial remedy other than habeas corpus and at the same time deal adequately with such important aspects of review as orderly venue, expedition, and the prevention of repetitious judicial proceedings."

Attorney General's proposed amendments to the Immigration and Nationality Act of 1952:

TO AMEND THE ACT OF JUNE 27, 1952, TO PROVIDE FOR JUDICIAL REVIEW OF DEPORTATION ORDERS UNDER THE IMMIGRATION LAWS, AND FOR OTHER PURPOSES

That section 242 of the Act of June 27, 1952, (66 Stat. 208; 8 U. S. C. 1252) is hereby amended by adding to that section the following new subsection:

"(i) (1) Any alien against whom a final order of deportation has been made under this section or under law in effect prior to December 24, 1952, and who is not in custody under the immigration laws, may obtain judicial review of such order only by filing a petition for review in the United States District Court for the judicial district within which the administrative proceedings under subsection (b), or the corresponding proceedings under prior law, were conducted, or, if he is in custody pursuant to the immigration laws, in habeas corpus proceedings, but not otherwise. For the purposes of this subsection, a deportation order shall be regarded as final only after the alien has exhausted the administrative remedies

available to him as of right under this Act and the regulations made thereunder. Nothing in this subsection shall preclude the Attorney General from detaining or continuing to detain such alien or taking him into custody pursuant to subsection (c) of this section after the issuance of a final order for his deportation.

(2) "A petition for review under this subsection shall be entitled '_____, *Petitioner* v. *The Immigration and Naturalization Service*, *Respondent*.' Upon the filing of such a petition, two copies shall be served upon the United States Attorney for such judicial district and one copy upon the District Director of the Immigration and Naturalization Service for the immigration district in which the court is located. Upon the filing and service of a petition for review under this subsection, the deportation of the alien shall be deemed stayed pending determination of such petition by the District Court. No such petition shall be filed unless the alien is physically present within the United States at the time of such filing. The respondent shall file any appropriate motion or an answer to the petition within twenty days after service of the petition as prescribed by this subsection, unless for cause shown additional time is allowed. Where necessary, the respondent shall produce in court the administrative record upon which the deportation order was made. The hearing and disposition of such a petition shall be expedited in the same manner as habeas corpus proceedings.

(3) "No objection to a deportation order shall be considered by the court in proceedings under this subsection or in habeas corpus proceedings unless such objection shall

have been urged in the administrative proceedings or, if it was not so urged, unless the court finds there were reasonable grounds for failure to do so, in which event the case shall be remanded for administrative consideration of such objection.

(4) "Except as provided in the following paragraph, the Attorney General's findings of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive.

(5) "If a person subject to a final order of deportation claims to be a national of the United States and makes a showing that his claim is not frivolous, the issue of his nationality shall be determined *de novo* by the court in proceedings under this subsection or in habeas corpus, in accordance with paragraph (1) of this subsection, and shall not be determined in proceedings under Section 360 (a) of this Act or otherwise.

(6) "A petition under this subsection shall not be entertained by any court if it appears that another such petition previously has been heard and determined by a court of the United States or if the validity of the deportation order has been upheld in habeas corpus or other judicial proceedings, except to the extent that such petition is based upon grounds which the court finds could not have been presented in the prior judicial proceedings. An application for a writ of habeas corpus to review the validity of a deportation order shall not be entertained if it appears that the alien has been denied relief under this subsection, unless it also appears that the procedure prescribed by this subsection is inadequate or ineffective to test the validity of the deportation order or that the application is based upon

grounds which the court finds could not have been presented in the prior proceeding under this subsection."

2. Section 236 of the Act of June 27, 1952 (66 Stat. 200; 8 U. S. C. 1226) is hereby amended by adding to that section the following new subsection:

"(e) Any alien against whom a final order of exclusion has been made may obtain judicial review of such order only in habeas corpus proceedings and not otherwise."

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No. 374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

EDWARD J. SHAUGHNESSY, AS DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION FOR THE DISTRICT OF NEW YORK,

Petitioner,

VS.

MAMPRIL SEQUEIRA PEDREIRO.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT

NEMEROFF, JELLINE, DANZIG & PALEY,
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---

BRIEF FOR RESPONDENT

Opinions Below

The opinion of the Court of Appeals (R. 8-11) is reported at 213 Fed. 2d, 768. The opinion of the District Court (R. 4-6) is unreported.

Jurisdiction

The judgment of the Court of Appeals was entered on July 1, 1954 (R. 11-12). The petition for a writ of certiorari was filed September 28, 1954, and was granted November 15, 1954 (R. 12). The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

Questions Presented

1. Whether deportation orders issued under the Immigration and Nationality Act of 1952 may be challenged in the courts otherwise than by habeas corpus proceedings.

2. Whether the Commissioner of Immigration and Naturalization is an indispensable party to a court action other than a habeas corpus proceeding challenging a deportation order of the District Director of Immigration and Naturalization.

Statutes Involved

The pertinent portions of the Immigration and Nationality Act of 1952 (66 Stat. 208, 8 U. S. C. 1252) and of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009) are set forth in the Appendix to the brief for petitioner (pp. 47-55).

Statement

The statement contained in the petitioner's brief is acceptable as a correct and adequate statement of the case.

Summary of Argument

It is the contention of respondent that when the Immigration and Nationality Act of 1952 (66 Stat. 208, 8 U. S. C. 1252) is read in the light of Section 10 of the Administrative Procedure Act, granting court review of administrative determinations, and in the further light of the remarks of the sponsors of the legislation in the Congressional debates, to the effect that such review, separate and apart from habeas corpus, was intended, an action such as the present one to review the determination of the administrative body here involved, properly lies.

It is the further contention of the respondent that the District Director, the person who, under the administrative regulations is charged with the duty of deporting respondent, is the sole requisite party respondent to the relief sought since the person sought to be deported obtains adequate remedy by injunctive relief against such District Director. *Williams* v. *Fanning,* 332 U. S. 490, 68 S. Ct. 188; *Hynes* v. *Grimes Packing Co.,* 337 U. S. 86, 69 S. Ct. 968; *Youngstown Sheet & Tube Co.* v. *Sawyer,* 103 F. Supp. 569, aff'd 197 F. 2d 582, 343 U. S. 579, 72 S. Ct. 863; *Stanford* v. *Lunde Arms Corp.,* 211 F. 2d 464.

ARGUMENT

I. The review of deportation orders by the courts is not limited to habeas corpus proceedings in cases which arise under the Immigration and Nationality Act of 1952.

The whole dispute under this point resolves itself down as to whether or not the following provisions of Section 10 of the Administrative Procedure Act (60 Stat. 243, 5 U. S. C. 1009) shall be applicable to deportation orders:

> "(A) Right of Review
>
> "Any persons suffering legal wrong because of any agency action, or adversely effected or grieved by such action within the meaning of any relative statute, shall be entitled to judicial review thereof."

Section 12 of the Administrative Procedure Act provides as follows:

> "No subsequent enacted legislation shall be held to supersede or modify the provisions of this Chapter *except to the extent that such legislation shall do so expressly.*" (Writer's emphasis.)

The Immigration and Nationality Act of 1952 was of course enacted subsequently to the Administrative Procedure Act, the latter having become law on June 11, 1946 (60 Stat. 237, 5 U. S. C. ¶ 1001).

The Government points to Section 242(b) of the Immigration and Nationality Act of 1952, wherein it is provided that in deportation cases "the decision of the Attorney General shall be final" and relies upon this language as expressly overruling the Administrative Procedure Act.

However, this Court has previously specifically decided that such words do not settle the question:

> "That the Attorney General's decisions are 'final' does not settle the question. The appellant properly emphasizes the ambiguity in that term. Read alone it might refer to the doctrine requiring exhaustion of administrative remedies before judicial process can be invoked" (*Heikkila* v. *Barber*, 345 U. S. 229, 233, 73 S. Ct. 603, 605).

In *Heikkila* v. *Barber*, supra, this Court decided what the word "final" meant when Congress enacted the Immigration Act of *1917*. At that time the philosophy embodied in the Administrative Procedure Act had not been conceived nor enacted and the sole remedy of a deportee subject to a deportation order was to resort to habeas corpus. Since Section 10 of the Administrative Procedure Act permitted review "except so far as (1) statutes preclude judicial review". The Court decided in *Heikkila* v. *Barber* that the *1917* statute intended to preclude review except in cases of habeas corpus.[1]

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[1] In a learned analysis of the Administrative Procedure Act by Bernard Schwartz, in Vol. 29, No. 6, New York University Law Review, June, 1954, the author takes even this decision severely to task:

> "The Court's decision in the Heikkila case appears to be as unsatisfactory as any which it has rendered in the field of administrative law in recent years. For the Court to hold that a provision for finality like that in the Immigration Act precludes review within the meaning of the introductory language

When the Immigration and Nationality Act of 1952 was passed, however, Congress had previously conceived of the philosophy embodied in the Administrative Procedure Act, and as this Court has previously stated "The House Report added that 'to preclude judicial review under this bill a statute, if not specific in withholding such review, must upon its face give clear and convincing evidence of an intent to withhold it. The mere failure to provide specially by statute for judicial review, is certainly no evidence of intent to withhold review'. The spirit of these statements, together with the broadly remedial purposes of the Act, counsel a judicial attitude of hospitality toward the claim that ¶ 10 greatly expanded the availability of judicial review" (*Heikkila* v. *Barber*, 345 U. S. 229, 232, 173 S. Ct. 603, 605).[2]

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at the beginning of Section 10 of the APA is for it to ignore both the background of provisions for administrative conclusiveness in our law and the actual facts with regard to the availability of review under the Immigration Act. The Court, as Mr. Justice Frankfurter said, in a strong dissenting opinion, 'gives the phrase "judicial review" in § 10 a technical content and thereby disregards the vital fact that although § 19 of the Immigration Act of 1917 * * * makes the decision of the Attorney General "final", they are not finally final.' As the hundreds of cases in the lower courts demonstrate, the Attorney General's actions are voluminously challenged and frequently set aside * * * the decisive fact is that the findings of the Attorney General are subject to challenge in the courts and from time to time are upset, whatever the formulas may be by which what he has finally done is undone'."

[2] The leading Supreme Court decision illustrating the judicial approach to statutory provisions for administrative finality is *Estep* v. *United States*, 327 U. S. 114 (1946). The statute there declared that the decisions of local draft boards were to be "final except where an appeal is authorized in accordance with such rules and regulations as the President may prescribe" (Selective Service Act, 54 Stat. 893 (1940), 50 U. S. C. Sec. 310 (1946)). Despite this provision, the Court held that a local board's induction order was not placed beyond judicial control. Mr. Justice Douglas emphasized the fact that the "statute * * * makes no provisions for judicial review" (*Estep* v. *United States*, 327 U. S. 114, 119 (1946)), and went on to state the usual rule in cases where the statute is silent on review, i.e., that legislative silence alone is not enough to bar review

Thus the question before this Court is not as in *Heikkila v. Barber*, whether an Act which preceded the Administrative Procedure Act, and which by the terms of the Administrative Procedure Act was intended to be preserved is to be interpreted. On the contrary. The question before this Court in this case is whether an Act which became law subsequent to the Administrative Procedure Act, and which by the very terms of the Administrative Procedure Act is to be subject to the requirements of that piece of legislation, unless expressly overruling it, contains sufficient language to overrule the Administrative Procedure Act.

We have seen that by the use of the word "final", Congress has used an ambiguous term and therefore, relying upon that word alone, one cannot say that Congress has *expressly* overruled the Administrative Procedure Act.

If the foregoing ambiguity however did require any resolution, we are fortunate in having available specific congressional debates dealing with the review aspects of the Immigration and Nationality Act. On April 24, 1952, during the House Debate on the Bill (HR 5678), Congressman Meader proposed an amendment to provision of paragraph 242 (b) that the Attorney General's decisions shall be final, to the effect that the order of deportation shall be subject to court review (98 Cong. Rec. 4415).

(*Estep v. United States*, 327 U. S. 114, 119 (1946)). The decision clearly stands for the proposition that, in the normal case, a provision for administrative finality does not mean that all judicial review is precluded. "It is only orders 'within their respective jurisdictions' that are made final" *Estep v. United States*, 327 U. S. 114, 120 (1946). Mr. Justice Douglas asserted in his *Estep* opinion and the jurisdictional question is a judicial question. To hold otherwise would be to impute an intent to the legislature to depart drastically from our normal tradition of judicial control of legality, in a case where the legislative intent has not been expressed unequivocally. "We cannot readily infer that Congress departed so far from the traditional concepts of a fair trial when it made the actions of the local boards 'final' * * *" (*Estep v. United States*, 327 U. S. 114, 122 (1946)).

Congressman Walter, co-author of the bill, and the Administrative Procedure Act, opposed this amendment as surplusage and stated clearly that § 10 of the Administrative Procedure Act is applicable. Said he (p. 4416):

> "Now we come to this question of finality of the decision of the Attorney General. That language means that it is a final decision as far as the administrative branch of the government is concerned, but it is not final in that it is not the last remedy that the alien has. Section 10 of the Administrative Procedure Act is applicable."

Petitioner's brief seeks to vitiate this statement upon the ground that "not all the statements made in the course of this one unprepared speech are entirely accurate and they cannot be relied upon as an authoritative interpretation of the statute" (brief, petitioner, p. 23).

Representative Walter was, however, the co-author of the Immigration and Nationality Act of 1952 and the Administrative Procedure Act, and a member of the bar. But, even it be assumed arguendo that he was not accurately interpreting this bill, an assumption which respondent refuses to concede, the fact remains that he *was* interpreting the bill for the entire House of Representatives, and his statements concerning the effect of the bill are operative facts in determining the intention of the House in passing the bill, unless the language of a particular provision is so clear that it cannot be interpreted more than one way (which is not the case here).

In the *Senate* debate, Senator McCarran said on May 22nd, 1952 (98 Cong. Rec. 5778):

> "The Administrative Procedure Act is made applicable to the bill. The Administrative Procedure Act prevails now."

Thus, the Congressional debates reveal that by its use of the word "final", Congress did not intend to expressly overrule the Administrative Procedure Act, but, to the

contrary, seems to have had every intention of preserving the review provisions thereof.

Congress' treatment of predecessor bills reveal no different intention:

After this Court's decision in *Sung* v. *McGrath*, 339 U. S. 33 (1950), holding that deportation proceedings under the *1917* Act were subject to the *procedural* requirements (as distinguished from review) of the Administrative Procedure Act, the Immigration Service instituted efforts to secure full exemption from the Examiner *and review* provisions of the Administrative Procedure Act.

H.R. 6652, 80th Congress, 2d Session, sought to relieve the Immigration Service from all provisions of the Administrative Procedure Act, except the public information section. The House Judicial Committee took specific note of the *Trinler* v. *Carusi* decision, 166 F. 2d 457, holding that deportation proceedings under the *1917* Act were *also* subject *to review* under the Administrative Procedure Act. (This was before this Court's decision in *Heikkila* v. *Barber*, supra, holding that such proceedings under the 1917 Act were *not* subject to review under the Administrative Procedure Act.) (House Report 2140, 80th Congress, 2d Session, pp. 2, 6.) The bill, however, failed of passage.

Efforts continued to secure exemption from the examiner *and review* provisions of the Administrative Procedure Act, with the introduction of the so-called Hobbs Bill in the 81st Congress, 1st Session (H.R. 10), which sought to grant specific exemption from Section 10 of the Administrative Procedure Act and the Declaratory Judgment Act (H.R. 1192, 81st Congress, 1st Session, p. 4). In his recommendation for favorable action on this Hobbs Bill, Mr. Justice Clark, who was then Attorney General, assumed that declaratory judgment and review under the Administrative Procedure Act *was* then available in immigration cases. In a letter of May 20, 1949, the then Attorney General states (H.R. 1192, p. 13):

"Section 5 would enumerate certain circumstances under which provisions of the Administrative Procedure Act and the Declaratory Judgment Act of 1934 shall not be applicable to certain immigration and nationality statutes * * *."

This bill, too, failed of enactment.

Efforts to confine judicial review exclusively to habeas corpus by express language was made in Section 6 of still another bill, to wit, S. 1832 (Senate Report 2230), 81st Congress, 2d Session. The text of this section was later reintroduced as Section 106 of the first Senate version of the Immigration and Nationality Act of 1952 (S. 3455, 81st Congress, 2d Session).

On April 20, 1950, Senator McCarran introduced an omnibus bill, which was later, as revised, to become the Immigration and Nationality Act of 1952. This was S. 3455, 81st Congress, 2d Session, which expressly provided in Section 106 that determinations of fact should not be subject to review by any court and that determinations of law should not be subject to review by any court except through the writ of habeas corpus.[3] Similar provisions were contained in a revised bill, S. 716, introduced by Senator McCarran on January 29, 1951 (82nd Congress, 1st Session), and in H. R. 2379, introduced by Congressman Francis Walter on February 5, 1951 (82nd Congress, 1st Session).[4]

[3] "Sec. 106. Notwithstanding the provisions of any other law—

(a) determinations of fact by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court;

(b) determinations of law by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court except through the writ of habeas corpus; and

(c) the exercise of discretionary authority conferred upon administrative officers by this Act or regulations issued thereunder shall not be subject to review by any court."

[4] Section 106 of S. 716 and H. R. 2379 provided:

"Sec. 106(a). Notwithstanding the provisions of any other law—

(1) determinations of fact by administrative officers under the

The Government (brief, p. 15) relies on the statement that Senate Report No. 1515 (81st Congress, 2d Session, p. 629) submitted on April 20, 1950, when S. 3455, supra, was introduced, to the effect that "Habeas Corpus is the proper remedy to determine the legality of the detention of an alien in the custody of the Immigration and Naturalization Service." This statement that habeas corpus is the proper remedy to determine the legality of the detention of an alien in custody is not the equivalent, as the Government claims, of a statement that habeas corpus is the *exclusive* remedy for the review of a deportation order in respect of an alien not in custody. Obviously if an alien is *in custody* habeas corpus is a remedy to determine the legality of the detention, as in *Carlson* v. *Landon*, 342 U. S. 524 (1952), but that is quite a separate matter from judicial review of the legality of a deportation proceeding and the deportation order. Moreover, even if S. Rep. 1515 meant what the Government says it means it would merely reflect approval of Section 106 of S. 3455, barring review except by habeas corpus. This section, however, as will be seen below, was later *eliminated* from the bill and from the 1952 Act.

Joint hearings were held on these three bills and representatives of numerous organizations recorded their opposition to the provisions restricting judicial review and urged the continued application of Section 10 of the Administra-

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provisions of this Act or regulations issued thereunder shall not be subject to review by any court;

(2) determinations of law other than with respect to liability for the payment of deportation, detention, and related expenses by vessels, aircraft, or other transportation lines, or the master, commanding officer, owner, agent, or consignee thereof, or the imposition of fines and penalties by administrative officers under the provisions of this Act or regulations issued thereunder shall not be subject to review by any court except through the writ of habeas corpus; and

(3) the exercise of discretionary authority conferred upon administrative officers by this Act or regulations issued thereunder shall not be subject to review by any court.

(b) Nothing in subsection (a) of this section shall be held to apply to court proceedings instituted under section 360 of this Act."

tive Procedure Act. These organizations included representatives of the American Bar Association, American Civil Liberties Union, Americans for Democratic Action, American Jewish Committee, Association of Immigration and Nationality Lawyers, Common Council for American Unity, and National Catholic Welfare Conference.[5] Joint Hearings Before the Sub-Committees of the Committees on the Judiciary on S. 716, H. R. 2379, H. R. 2816, pp. 144, 146, 536-7, 591, 617, 699, 735, 739. It was understood that elimination of Section 106 would leave Section 10 of the Administrative Procedure Act applicable.

The revised omnibus bills introduced later in the 82nd Congress, 1st Session (S. 2055, introduced by Senator McCarran on August 27, 1951, and H. R. 5678, introduced by Congressman Walter on October 9, 1951), and a subsequent revised omnibus bill introduced in the 82nd Congress, 2nd Session (S. 2550, introduced by Senator McCarran on January 29, 1952), eliminated Section 106 of the prior bills and neither the prior Section 106 nor its provisions appear in the 1952 Act. This elimination of Section 106, in the light of the Joint Hearings, discloses the clear intent to continue judicial review under the Administrative Procedure Act as it was then practiced and understood.

S. 2842 (82nd Cong., 2nd Sess.) introduced on March 12, 1952, by Senator Humphrey for himself and twelve other Senators, was an omnibus bill differing in several respects

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[5] The representative of the American Bar Association (Mr. Wasserman) stated (pp. 536-7):

"We believe that determinations of immigration and naturalization matters as well as citizenship matters should be subject to judicial review provided by Section 10 of the Administrative Procedure Act."

The statement on behalf of the National Catholic Welfare Conference states (p. 735):

"4. Section 106: It is our conviction that administrative decisions should not necessarily be final; rather that immigration and naturalization cases have the benefit of review by the courts as presently applies under the Administrative Procedure Act."

from the McCarran and Walter bills but similar in the respect that it did not contain the eliminated provisions for the restriction of judicial review in former Section 106.[6]

The report of the Committee on the Judiciary (Report No. 1137, 82nd Congress, 2nd Session) submitted to the Senate on January 29, 1952, on S. 2055, explained that the elimination of the provisions contained in Section 106 of the former bills was (p. 28): "not intended to grant any review of determination made by consular officers, nor to expand judicial review in immigration cases beyond that under existing law." But it is very important to clearly observe what the existing law was at the time of the issuance of the Senate Report. The Administrative Procedure Act had been interpreted in 1948, 1949 and in 1950 by *Trinler* v. *Carusi* (1948), 166 F. 2d 457; *Podovinikoff* v. *Miller*, 179 F. 2d 937 (1950); *Kristensen* v. *McGrath*, 179 F. 2d 796, aff'd in *McGrath* v. *Kristensen*, 340 U. S. 162, 71 S. Ct. 224 (1950), and *Prince* v. *Commissioner*, 185 F. 2d 578 (1950). In *all* of these cases it had been held that deportation orders were subject to review under the provisions of Par. 10 of the Administrative Procedure Act.[7] The opinion of this Court in *Heikkila* v. *Barber*, supra, decided in 1953, had not yet been handed down.

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[6] Note should be made that when the Immigration Service finally secured an exemption from the Administrative Procedure Act in the 1951 Supplemental Appropriations Act (P. L. 843) (81st Cong., 64 Stat. 1048), such exemption was limited to Sections 5, 7 and 8 of the Administrative Procedure Act (which sections deal with procedure). It did *not* exempt deportation orders from the applicability of Section 10 of the Administrative Procedure Act dealing with court review.

[7] "While it might look as though judicial review were precluded by the giving to the deportation order the air of finality, in practice such finality never existed because of the availability of habeas corpus. The fact that review has been judge-made out of the concept of due process does not make it any less a qualification of the statute than if the legislators had put the provisions in it when the statute was first drawn" (*United States ex rel. Trinler* v. *Carusi*, 166 F. 2d 457, 461 (3d Cir. 1948).

In addition to the foregoing, the Court in *Rabinstein* v. *Brownell*, 206 F. 2d 449, found three additional pieces of evidence within the Immigration and Nationality Act of 1952 itself which would indicate that judicial review of a final order of importation was intended by Congress. They were as follows:

1. "The 1952 Act and its historical background. Unlike the 1917 Act, Sec. 242(b)(4) of the 1952 Act provides that 'no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence'" (p. 452).
2. "Unlike the 1917 Act, Sections 242(c) and 242(e) of the 1952 Act expressly recognize that there may be 'judicial review' of a final order of deportation. Section 242(c) provides that 'the Attorney General shall have a period of six months from the date of such order, *or, if judicial review is had, then from the date of the final order of the court*, within which to effect the alien's departure from the United States * * *.'" (Court's emphasis.)

   'Judicial review' is not synonymous with habeas corpus.[7] Nothing in Section 242(c) restricts it to habeas corpus" (p. 452).
3. "Section 360(c) of the 1952 Act itself provides, as to persons seeking admission to the United States, that 'A final determination by the Attorney General that any such person is not entitled to admission to the United States shall be subject to review by any court of competent jurisdiction *in habeas corpus proceedings and not otherwise*.'[13] The fact that Congress said clearly what it meant in Section 360(c) with regard to admission is strong evidence that it did not mean that it did not say in Section 242(c) with regard to deportation[14]" (p. 453).

"[7] The Supreme Court said in the Heikkila case: 'it is the scope of inquiry on habeas corpus that it differentiates use of the writ from judicial review as that term is used in the Administrative Procedure Act.' 345 U. S. at page 236, 73 S. Ct. at page 607."

"[13] Emphasis added."

"[14] Section 242(c) provides that 'Any court of competent jurisdiction shall have authority to review or revise any deter-

The following additional considerations affect the determination of the issues in the case at bar.

The passage of the Administrative Procedure Act was widely heralded as marking the beginning of a new era in our administrative law.[8] The Administrative Procedure Act, said its sponsor, "is a bill of rights for hundreds of thousands of Americans whose affairs are controlled or regulated in one way or another by agencies of the Federal Government."[9] The Act was hailed as "the most important statute affecting the administration of justice in the federal field since the passage of the Judiciary Act of 1789."[10]

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mination of the Attorney General *concerning detention, release on bond, or other release during such six-month period upon a conclusive showing in habeas corpus proceedings* that the Attorney General is not proceeding with such reasonable dispatch as may be warranted by the particular facts and circumstances in the case of any alien to effect such alien's departure from the United States within such six-month period.' (Emphasis added.)

"As the Second Circuit has held regarding practically the same language in Section 242(a), this sentence 'provides but an added statutory recognition of a basis for judicial review, not a limitation upon the power * * *.' United States ex rel. Yaris v. Esperdy, 202 F. 2d, 109, 112. (1) Read literally the sentence grants, and does not withdraw or restrict, authority to review. (2) It does not touch the subject of review, in habeas corpus or otherwise, of deportation orders, but relates only to review of 'detention, release on bond, or other release' when the Attorney General is not proceeding with 'reasonable dispatch' to effect a deportation. (3) The six-month period referred to, during which this sentence authorizes review of these matters, begins to run only after 'a final order of deportation * * * or, if judicial review is had, then from the date of the final order of the court * * *.' (4) So far if at all as the sentence in question may imply that the matters to which it refers, during the time to which it refers, may be reviewed only in habeas corpus, it implies that review of other matters and review at other times are not so limited."

[8] Vanderbilt, The Doctrine of the Separation of Powers and its Present Day Significance 88 (1953).

[9] Administrative Procedure Act, Legislative History, Sen. Doc. #248, 79 Cong. 2d Sess. 311 (1946).

[10] Vanderbilt, The Federal Administrative Procedure Act and the Administrative Agencies (1947).

For these reasons this Court, in *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, indicated that it would give a broadly remedial interpretation to the Act, noting that "any exception we may find to its applicability would tend to defeat this purpose" (p. 41), and in *Heikkila* v. *Barber*, 345 U. S. 229, 232, stated that it would maintain "a judicial attitude of hospitality toward the claim that paragraph 10 greatly expanded the availability of judicial review."

Practical considerations, as well are important. In reality, the question of the availability of review under the Administrative Procedure Act is of great consequence to an alien against whom a deportation order is issued. Prior to the Administrative Procedure Act, review in such cases could be obtained only by means of habeas corpus. Before the writ could be issued, it was necessary for the alien to be in the custody of the Attorney General. "The person about to be deported was thus in a position where he was required by the order of the Attorney General to wind up his affairs, to bid last farewell to his family and friends and to submit himself to physical deportation before he could seek any relief or any review of what the Attorney General had determined were his rights under the immigration laws of the United States" (*Orlow, Deportation Under the Administrative Procedure Act of 1946*, 22 Temp. L. Q. 74, 77 (1948)). If Section 10 of the Administrative Procedure Act were applicable, the alien could avoid having to be placed in this undesirable position before being able to obtain judicial relief.

> "The point is legally narrow but practically important. It means that one against whom a deportation order is outstanding but not executed may at once move, by means of a declaratory judgment, to challenge the administrative process insofar as the substantive law pertaining to deportation permits challenge."[11]

[11] *Heikkila* v. *Barber*, 345 U. S. 229, 240 (1953). The Department of Justice itself has, since this case, proposed legislation to

Thus, the statute itself, the legislative history, the broad policies of the Administrative Procedure Act, the avowed intentions of this Court to carry out these policies and the practical considerations involved, all militate toward one conclusion: Deportation orders issued under the Immigration and Nationality Act of 1952 are subject to review by court action under Par. 10 of the Administrative Procedure Act.

II. The District Director of Immigration is the proper party respondent and no other party need be joined in a court action to review a deportation order pursuant to Section 10 of the Administrative Procedure Act.

The opinions of this Court in three cases decided by it, support the contention of the respondent:

Williams v. *Fanning*, 332 U. S. 490, 68 S. Ct. 188;
Hynes v. *Grimes Packing Co.*, 337 U. S. 86, 69 S. Ct. 968;
Youngstown Sheet & Tube Co. v. *Sawyer*, 103 Fed. Supp. 569, aff'd 197 F. 2d 582, 343 U. S. 579.

These decisions can only lead to one logical result in cases involving petitions for review from deportation orders. This result was reached in *Ragni* v. *Butterfield*, 115 Fed. Supp. 953, U. S. D. E. D. Mich. (1953), by Judge Picard, who, in the following well-reasoned analysis, held that the Attorney General was not an indispensable party:

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make deportation orders subject to judicial review as soon as they are administratively final, so that aliens need not wait until they are in custody before being able to challenge such orders in the courts. In letters addressed to the Speaker of the House and the Vice President, dated March 10, 1954, the Attorney General asked for the introduction of bills giving effect to this proposal. It was also approved in a resolution adopted by the House of Delegates of the American Bar Association on March 9, 1954. See 22 U. S. L. Week 2434 (March 16, 1954).

"Primarily, we held, that to require a litigant to travel thousands of miles to prosecute a legal claim is not only unjust and highly inequitable but virtually a denial of the right to bring suit. We are not unmindful of the fact that other courts have held to the contrary.

* * * * * *

"In practically all the cases decided on the basis of Williams v. Fanning, supra, in which the immigration officer or the Attorney General were held to be indispensable parties, the rationale seems to center on the theory that if one district court should cancel the order of deportation where the superior officer has not been made a party, and the plaintiff should move to another district and be taken into custody by the District Director there, the first court's order would not bar the latter from deporting plaintiff as the second District Director was not a party before the first district court. But the supreme court in Williams v. Fanning, supra, very pointedly said:

> '* * * if the decree which is entered will effectively grant the relief desired by expending itself on the subordinate officer who is before the court'

the superior is not indispensable.

"With that in mind, we are moved to inquire who is the best judge of what remedy the plaintiff desires, the plaintiff himself or the government? It appears to this court that such authorities holding that the Attorney General or the Director of Immigration are necessary parties are in the position of telling the plaintiff what he ought to have if he is going to protect himself, rather than what his rights may be. We find ourselves faced, therefore, with the unusual situation that defendant government is concerned about the efficacy of plaintiff's remedy.

"If the petitioner, rather than incur the expense and inconvenience of traveling to the District of Columbia, is content to seek the limited relief that a district court can afford him under the present law, it is our opinion that we should not deny him that relief simply because we cannot give him immunity from further prosecution

in some other district to which he may never go or through which he may never pass.

"Such conclusion, we believe, would be in harmony with, and a more rational construction of, the ruling in Williams v. Fanning, supra, and Hynes v. Grimes Packing Co., 337 U. S. 86, 69 S. Ct. 968, 93 L. Ed. 1231."

The reasoning was carried even further in the recent case of *Stanford* v. *Lunde Arms Corp.*, 211 F. 2d 464, where, in issuing an injunction against a local postmaster, the Court said:

"We are not disposed to assume, as appellant suggests may be the case, that the postmasters elsewhere will ignore the court's decision and decline to deliver the product when it reaches them." [12]

Judge Picard might well have additionally referred to the new rules and regulations promulgated by the Attorney General on December 17, 1952, which regulations specifically delegate to the District Director the power to carry out the Attorney General's authority to deport an alien who has exhausted his administrative remedies. These regulations are as follows:

"Part 243—Deportation of Aliens in the United States.

Sec. 241.1 *Issuance of warrants of deportation; country to which alien shall be deported; cost of detention; care and attention of alien*—(a) Issuance. In any case in which an order of deportation becomes final a warrant of deportation shall be issued. District directors shall issue warrants of deportation.

(b) *Determination of place and cost of deportation, and necessity for attendants.* District directors shall

[12] See *Williams* v. *Fanning revisited*, 54 Col. L. Rev. 1128, 1138 ft. 45: "It is submitted that the reasoning of those cases which refuse to enjoin the enforcement of a deportation order is weak for this is the relief petitioner believes will be effective and stare decisis makes the first determination, if not binding, at least persuasive in another district. The reasoning is baseless if res adjudicata is applicable to subsequent proceedings."

exercise the authority contained in section 243 of the Immigration and Nationality Act to designate the country to which, and at whose expense an alien in the United States shall be deported, and to determine when an alien's mental or physical condition requires the employment of a person to accompany the alien.

Sec. 243.2 *Finality of decision.* No appeal shall lie from the decision of the district director in the exercise of the authority described in Sec. 243.1."

Section 243 of the Immigration and Nationality Act, 8 USCA, par. 1253, is the section which authorizes the Attorney General to carry out the deportation of an alien who has been determined to be deportable pursuant to the administrative hearings accordable to him pursuant to the Immigration and Nationality Act. As can be seen the Attorney General has, pursuant to the foregoing rules, delegated this authority specifically to the District Director in charge of the district in which the alien resides. This authority is in accordance with Section 103 of the Immigration and Nationality Act (8 USCA, par. 1103) which states that the Attorney General is authority to "appoint such employees of the Service as he deems necessary and to delegate to them or to any officer or employee of the Department of Justice in his discretion any of the duties and powers imposed upon him in this chapter."

Since, therefore, effective relief can be granted against the District Director of Immigration and Naturalization, he is the only necessary party defendant.

CONCLUSION

Deportation orders under the Immigration and Nationality Act of 1952 may be challenged under Section 10 of the Administrative Procedure Act and the District Director of Immigration and Naturalization is the only necessary party defendant.

Respectfully submitted,

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No. 374

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

EDWARD J. SHAUGHNESSY, as District Director of Immigration and Naturalization for the District of New York,
Petitioner,

vs.

MAMPRIL SEQUEIRA PEDREIRO.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

ADDENDUM TO BRIEF FOR RESPONDENT

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ADDENDUM TO BRIEF FOR RESPONDENT

Pertaining to both points raised in the brief of the respondent is the late case, *Aguilera-Flores* v. *Landon,* 125 Fed. Supp. 55, decided by the United States District Court, Southern District of California, on September 22, 1954, holding that an alien has the right to bring a petition for review of an outstanding deportation order against him in line with the theory of *Williams* v. *Fanning* (332 U. S. 490, 68 S. Ct. 188), and holding likewise that the district director is the appropriate party defendant, no other being required, since no affirmative relief is sought but merely injunctive relief against the district director carrying out a deportation order.

This case should be contrasted with a decision by the same court on the same day, *Laureano-Gonzalez* v. *Main,* 125 Fed. Supp. 60, where in a suit seeking *affirmative* action on

the part of the Attorney General, it was held that the Attorney General was a necessary party defendant.

* * * * * *

Relevant to Point One of the brief, the question of whether or not the alien is limited to the remedy of habeas corpus, is the latest change in the administrative procedure adopted by the United States Department of Justice. Whereas, formerly the procedure, when a deportation order had been issued was to require the alien to surrender at Ellis Island or some other detention station where he was to await actual deportation, this procedure has now been changed and the Attorney General has announced publicly that aliens will not be subjected to such detention except in the cases of severe security risks.

Accordingly, the procedure now adopted by the Immigration Service is evidenced by Exhibit "A" attached hereto, in which the alien is asked to surrender just a few hours prior to embarkation time.

These facts are brought to the attention of the court because if the position of the petitioner is to be sustained, to wit, that the alien must first surrender and then bring habeas corpus proceedings, a travesty is made of his rights. It is elementary that the alien must be in custody before the court can obtain jurisdiction in habeas corpus proceedings. Thus the alien must within a few hours conduct a mad race to preserve the fundamental rights given to him by the law of the land.

This latest change in procedure thus only serves to point up the inadequacy of the remedy asserted by the government to be the sole remedy of the alien.

Respectfully submitted,

NEMEROFF, JELLINE, DANZIG & PALEY,
Attorneys for Respondent.

AARON L. DANZIG,
of Counsel.

EXHIBIT "A"—SPECIMEN FORM

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE
70 COLUMBUS AVENUE
NEW YORK 23, N. Y.

March 16, 1955

3-2662
10/27/54

Please refer to this
File Number: A9 544 161 DDPB

National Surety Corporation
110 John Street
New York, N. Y.

Dear Sirs:

Formal demand is made upon you to deliver ANTONIO CABRITA MEALHA into the custody of an officer of this Service at Pier 84 located at the foot of West 44th Street, New York, N. Y. on April 6, 1955 for deportation to Lisbon, Portugal on the SS "Vulcania" of the Italian Line. Such surrender is to be made at the embarkation booth, tourist class, at least two hours prior to embarkation time.

You are informed that should delivery not be effected in accordance with this demand appropriate action will be taken with a view to breaching the outstanding bond.

It will be necessary for the deportee to communicate promptly with the steamship line to ascertain exact embarkation time and any changes in sailing schedule; to obtain tags and labels for baggage; to obtain the time baggage must be delivered to the pier; and to obtain information as to the amount of baggage permitted free of charge. The deportee will be required to pay for any excess baggage costs.

You are requested to acknowledge receipt of this letter by placing your name upon the carbon copy enclosed, which may be returned in the attached self-addressed envelope requiring no postage.

Very truly yours,

EDW. H. SHAUGHNESSY
District Director
New York District

By PHILIP FORMAN S/

PHILIP FORMAN, Chief
Detention and Deportation Section

cc: Aaron L. Danzig
350 Fifth Avenue
New York, N. Y.

REGISTERED MAIL
RETURN RECEIPT REQUESTED